IN THE UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 31 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DURABILITY INTERIORS, INC., an Oklahoma corporation

Plaintiff,

vs.

SYNTEX INCORPORATED, an Illinois corporation, D. DWAYNE SELK, an individual and RONALD V. COPPOLINO, an individual

Defendant.

NO. 80-C-202-B

JUDGMENT AS TO DEFENDANTS
SYNTEX INCORPORATED AND D. DWAYNE SELK ONLY

THIS ACTION was considered by the Court on the 31st day of May, 1980, on Application of the Plaintiff for the Entry of Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure; it appearing to the Court that the Complaint in this action was filed on April 14, 1980, that Summons and Complaint were duly served on the Defendants Syntex Incorporated and D. Dwayne Selk, as required by law, it further appearing to the Court that said Defendants have wholly failed to enter their appearances in the action or otherwise plead, and have defaulted, and it further appearing that default was entered against the Defendant on the 20 day of May, 1980, by the Court Clerk, and that no proceedings have been taken by Defendant since entry of his default.

The Court, having reviewed the pleadings, Exhibits and Affidavits on file finds:

1. That the Defendants, SYNTEX INCORPORATED AND D. DWAYNE SELK are in default.

2. That Plaintiff is entitled to default judgment in its favor, for the relief prayed for.

3. That Plaintiff is the prevailing party and thereby entitled to an attorney fee award pursuant to Title 12, Oklahoma Statutes, Section 936.

4. That the Court finds, based upon Affidavits on file in the action, a reasonable attorney fee for Plaintiff is $_____.

IT IS ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, DURABILITY INTERIORS, INC., recover of Defendants, SYNTEX INCORPORATED and D. DWAYNE SELK, separately, judgment in the sum of $24,828.20, with 10% per annum on said sum from September 1, 1979 until date of judgment, and with interest on the judgment at the rate of 12% per annum until said judgment is satisfied, in accordance with Title 12 Oklahoma Statutes, Section 727(1) and all costs expended in the action.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, that Plaintiff DURABILITY INTERIORS, INC., recover of Defendants, SYNTEX INCORPORATED and D. DWAYNE SELK, judgment for reasonable attorney fees in accordance with Title 12, Oklahoma Statutes, Section 936, determined by the Court to be the sum of $ 3713.00.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MARCIA REECHER, formerly Swearengin, Plaintiff,	)	
vs.	)	No. 79-C-626-BT
KIEKE PROPERTY MANAGEMENT, INC., a Texas Corporation, Defendant.	)	

FILED

MAY 30 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Marcia Reecher, formerly Swearengin, and the defendant, Kieke Property Management, Inc., a Texas corporation, stipulate that the above entitled cause may be and is dismissed with prejudice at the cost of the plaintiff.

MARCIA REECHER, formerly Swearengin

By Thomas G. Marsh

Thomas G. Marsh
Dyer, Powers, Marsh, Turner & Armstrong
Attorneys for Plaintiff
525 South Main, Suite 210
Tulsa, Oklahoma 74103
918/587-0141

KIEKE PROPERTY MANAGEMENT, INC.

By John G. Moyer, Jr.

John G. Moyer, Jr.
Rosenstein, Fist & Ringold
Attorneys for Defendant
525 South Main, Suite 300
Tulsa, Oklahoma 74103
918/585-9211

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VESTA HOWARD,

Plaintiff,

vs

SAFEWAY STORES, INC.,

Defendant.

No. 79 C 155 BT

STIPULATION OF DISMISSAL WITH PREJUDICE

COME now the plaintiff, through her attorney, H. G. E. Beauchamp, and the defendant, through its attorney, Joseph F. Glass, and stipulate that the above captioned cause of action be dismissed with prejudice to filing a future action herein.

Attorney for Plaintiff

Attorney for Defendant

O R D E R

And now on this 30 day of May, 1980, there came on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, stipulation of the parties hereto of dismissal, parties hereto having advised the court that all disputes between the parties have been settled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled cause be and the same is hereby dismissed with prejudice to the right of the plaintiff to bring any future action arising from said cause of action.

Judge

kr

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CALVARY TEMPLE ASSEMBLY OF GOD, INC., Plaintiff,	)	
v.	)	No. 79-C-386-BT
LEIRD CHURCH FURNITURE & MANUFACTURING COMPANY, INC., Defendant.	)	

STIPULATION
AND
ORDER OF DISMISSAL

IT IS HEREBY STIPULATED, by and between counsel for all parties hereto, subject to the approval of the Court, as follows:

1. The claims presented by the complaint herein shall be dismissed without prejudice pursuant to Rule 41(a) of the Federal Rules Civil Procedure.

2. Each party shall bear its own costs and attorneys' fees.

3. The controversies herein have been resolved in a settlement agreement entered into by the parties; however, the performance of that settlement agreement has been prevented due to unavailability of materials. It is the intent of the Defendant to perform its obligations under the settlement agreement as soon as possible and it is Plaintiff's belief that Defendant will so perform.

Therefore, in order to avoid unnecessary legal expenses and to relieve the court calendar of this matter the parties hereto have entered into this stipulation.

Dated May 28, 1980.

EAGLETON, EAGLETON & OWENS, INC.

By _____
Larry D. Henry

1606 First National Bank Building
Tulsa, OK 74103
(918) 587-0021

ATTORNEYS FOR PLAINTIFF

GABLE, GOTWALLS, RUBIN, FOX, JOHNSON & BAKER

By _____
James M. Sturdivant

Fourth National Bank Building
Tulsa, OK 74119

ATTORNEYS FOR DEFENDANT

ORDER

The Court finds the interest of justice will be served by approving the Stipulated Dismissal above.

IT IS THEREFORE ORDERED that the above captioned matter shall be dismissed without prejudice.

Dated this 30 day of May, 1980.

S/ THOMAS R. BRETT

Thomas R. Brett
Judge United States District Court
for the Northern District of Oklahoma

FILED

IN AND FOR THE UNITED STATES DISTRICT COURT IN AND FOR

THE NORTHERN DISTRICT OF OKLAHOMA

MAY 30 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOHN WILLIAM BERKEY,)
)
Plaintiff,)
)
vs.) Civil Action No. 80-C-251-E
)
GEORGE READE,)
)
Defendant.)

NOTICE OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, John William Berkey, by and through his attorney of record, Tom Tannehill, and does herewith dismiss with prejudice as to any future actions of the above cause against the Defendant.

Tom Tannehill
Attorney for Plaintiff
Penthouse
5200 South Yale Avenue
Tulsa, Oklahoma 74135

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS et al.,	)	
Plaintiffs	)	
vs.	)	CIVIL ACTION NO. 80-C-184-B
TULSA EXCAVATING, INC.,	)	
Defendant.	)	

ORDER

This matter coming on to be heard upon the stipulation of the parties hereto to dismiss the above-entitled action with prejudice and without costs, it appearing to the Court that all matters in controversy for which this action was brought having been resolved, and the Court otherwise being fully advised in the premises:

IT IS HEREBY ORDERED that the above-entitled matter be and hereby is dismissed with prejudice and without costs.

ENTER:

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

DATED:

May 30, 1980

NAMES AND ADDRESSES OF ATTORNEYS FOR PLAINTIFFS:

MICHAEL A. CRABTREE
4115 Chesapeake Street, N.W.
Washington, D. C. 20016
202-362-1000

H. WAYNE COOPER
1200 Atlas Life Building
Tulsa, Oklahoma 74103
918-582-1211

NAME AND ADDRESS OF ATTORNEY FOR DEFENDANT:

DONALD E. HAMMER
205 Denver Building
Tulsa, Oklahoma 74119
918-582-5181

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 29 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

HUDSON R. MEADORS, III, individually and d/b/a IMI INSURANCE AGENCY, Plaintiff, vs. GEORGE R. GARRICK, and MRS. GARRICK, his mother, PATTERSON REALTORS, RAY WHITE and BOB ROSS, Defendants.	)	No. 80-C-158-BT

NOTICE OF DISMISSAL BY STIPULATION

Comes now the plaintiff, HUDSON R. MEADORS, III by and through his attorney of record, and hereby respectfully advises the court that upon stipulation and agreement of all the parties hereto, plaintiff's complaint may be and the same hereby is dismissed with prejudice to its refiling for the reason that the parties hereto, for good and valuable consideration, have entered into and consummated a compromise settlement agreement.

Robert L. Roark
Robert L. Roark
Attorney for the Plaintiff

Approved as to Form and Content:

Donald E. Hammer
Don Hammer, Esq.
Attorney for Defendants
George R. Garrick and Mrs. Garrick

R. Hayden Downie
R. Hayden Downie
Attorney for Defendants
Patterson Realtors and
Ray White

Robert H. Tips
Bob Tips
Attorney for Defendant
Bob Ross

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TULSA PORT WAREHOUSE COMPANY, INC.; MID-AMERICA PACKING SPECIALISTS DIVISION, A DIVISION OF THE TULSA PORT WAREHOUSE COMPANY, INC.,	)	
Bankrupt,	)	
JAMES ADELMAN, Trustee,	)	No. 79-C-354-BT
Plaintiff-Appellee,	)	
vs.	)	
GENERAL MOTORS ACCEPTANCE CORPORATION, and CHUCK NAIMAN BUICK COMPANY,	)	
Defendants-Appellants	)	

O P I N I O N

Defendants-Appellants, General Motors Acceptance Corporation (GMAC) and Chuck Naiman Buick Company (Naiman), appeal to this Court for reversal of judgment entered by the Bankruptcy Court on March 13, 1979. That judgment and the accompanying Findings of Fact and Conclusions of Law held that leases involving four automobiles were as a matter of law leases intended for security and thus subject to the perfection requirements of the Uniform Commercial Code. It was further held that since these security agreements had not been perfected as required by the U.C.C., the interest of the plaintiff trustee in bankruptcy in the subject automobiles or the proceeds is superior to that of the general creditor defendants, GMAC and Naiman.

After carefully considering the substance of the agreements and the applicable law, the Court finds that the judgment of the Bankruptcy Court should be affirmed.

During 1976 and 1977, the Bankrupt in this case entered into four separate "Non-Maintenance Lease Agreements" with Naiman, which were assigned to GMAC. The four agreements are identical in all pertinent respects.

The leases here involved are "open-end" leases which are distinguished from "closed-end" leases primarily by the method

of termination as provided in Items 30 and 31 of the agreements.[1/]

1/ "30. NORMAL LEASE TERMINATION AT THE END OF THE SCHEDULED TERM

(a) Open-End Lease--Immediately upon the termination of this lease, the lessee shall return the vehicle to the Lessor at the address hereinbefore mentioned and Lessor shall sell the vehicle at wholesale in such commercially reasonable manner as Lessor shall determine. If the net amount received from such sale is more than the Agreed Depreciated Value of Vehicle (ITEM 5), Lessor shall pay such excess to the Lessee. If the net amount received from such sale is less than the Agreed Depreciated Value of Vehicle (ITEM 5) the total amount of such deficiency shall be paid by Lessee upon demand to the Lessor with the understanding that only if this vehicle is leased primarily for personal, family, household or agricultural use and only if this vehicle is returned at the end of the full lease term, that the maximum amount of such deficiency shall not exceed two times the amount of the Fixed Monthly Rental Charges (ITEM 7). This deficiency limitation does not apply to charges for damages to the leased vehicle or for other default nor does it apply to vehicles leased for business or commercial use. The 'net amount' received from the sale of the vehicle as used in this lease shall be defined as the sale price of the vehicle less all direct expenses of the Lessor incurred in selling, preparing and holding the vehicle for sale and less all debts incurred by Lessee which if not paid, might constitute a lien on the vehicle or a liability to the Lessor.

(b) Closed-End Lease--Immediately upon termination of this lease the Lessee shall return the vehicle to the Lessor at the address hereinbefore mentioned in good condition and if all terms and conditions of this lease have been complied with, neither party shall have any further obligation to the other.

31. PREMATURE LEASE TERMINATION: It is intended that this lease will run for the full term specified on the preceding page, however, should unforeseen developments arise, the Lessee may elect, at his option, to terminate at any time after the first six months providing that Lessee is not in default, by giving the Lessor at least 30 days prior written notice of his intention and by return of the vehicle to the Lessor at the address hereinbefore mentioned. In the event of premature termination, if insurance has been procured by or provided by the Lessor, the provisions of the insurance policy(s) will define the Lessee's liability for insurance premiums. Lessee liability to the Lessor for vehicle rentals in the event of premature lease termination is defined according to the type of lease as follows:

(a) Premature Termination Liability-- Open-End Lease: The Cash Down Payment (ITEM 2) together with the Net Trade-In (ITEM 3) constitute prepaid depreciation which will be credited against the Original Value of the Vehicle (ITEM 1) at lease inception. The portion of the Total Amount of Fixed Monthly Rentals NOT To Be Credited Against Original Value (ITEM 6A) will be earned by the Lessor according to the "Rule of 78." The earned portion of the Total Amount of Fixed Monthly Rentals NOT To Be Credited Against Original Value will be subtracted from the sum of all the Fixed Monthly Rental Charges (ITEM 7) paid by the Lessee to the Lessor up to the point of lease termination to establish the amount of the depreciation credit against the Original Value of the Vehicle (ITEM 1) to which the Lessee will be entitled based upon the Fixed Monthly Rental Charges which he has paid. The depreciation credit calculated in this way together with the prepaid depreciation based upon both the Cash Down Payment (ITEM 2) and the Net Trade-In (ITEM 3) will be subtracted from the Original Value of the Vehicle (ITEM 1) to establish the Maximum Amount of Open End Lessee Liability in the event of premature lease termination. The Lessor shall sell the vehicle at wholesale in such commercially reasonable manner as Lessor shall determine. If the net amount received from such sale is more than the Maximum Amount of Open End Lessee Liability in the event of premature lease termination as set forth in this paragraph, Lessor shall pay such excess to Lessee. If the net amount received from such sale is less than the Maximum Amount of Open End Lessee Liability in the event of premature lease termination, the total amount of such deficiency shall be paid by Lessee upon demand to Lessor.

The agreements provide that in a closed-end lease, at the end of the lease term, the lessee returns the vehicle to lessor and the obligations of both come to an end. Further, if the lease is terminated prematurely, the lessee is responsible for the unpaid rental with the vehicles being returned to lessor.

In an open-end lease, the termination provisions are somewhat more complex. Here, at the end of the lease term, the lessee is to return the vehicles to the lessor. However, unlike the situation involving a closed-end lease, the relationship between lessor and lessee does not come to an end. Rather, the lessor, upon return of the vehicle, must sell the vehicle, and if the net amount received from the sale is greater than the predetermined "agreed depreciated value", lessor must pay any excess to the lessee. On the other hand, if the net amount received is less than the "agreed depreciated value", lessee must pay to lessor the deficiency.

In case of premature termination, by default or choice of lessee, the lessee must also return the vehicle and the lessor must sell it. However, the "agreed depreciated value" is adjusted to determine the "maximum amount of open end lessee liability," and then lessee will either receive a refund or be required to pay a deficiency, based upon the net sale price. The "net amount" in either event is defined as the sale price of the vehicle less costs to the lessor in connection with the sale and all debts incurred by lessee which might constitute a lien on the vehicle or a liability to the lessor.

The face of each agreement contains a section entitled "Lessee Liability Disclosure: (must be completed if this is an open-end lease)." In this section, the amounts for which lessee will be

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1/ (b) PREMATURE TERMINATION LIABILITY -- CLOSED-END LEASE: In the event (Cont'd) of premature termination of a closed-end lease the Lessee shall be responsible for an amount equal to the total amount of unpaid Fixed Monthly Rental Charges (ITEM 7A) for the remaining months of this lease and this total amount shall be payable according to the original payment schedule except that if the Lessee is in default with respect to the originally agreed upon payment schedule this total amount will become due and payable to the Lessor upon demand."

responsible are computed. The computation begins with the Original Value of the vehicle, from which is deducted any Cash Down Payment and or net trade-in, to arrive at the Net Original Value. In these particular leases, the original value and the net original value are the same, since there is no down payment or trade-in. The next item is designated Agreed Depreciated Value, and is an estimate of the value of the vehicle at the end of the lease term. This Agreed Depreciated Value is deducted from the Net Original Value, and the difference is designated as Total Amount of Fixed Monthly Rentals for the Full Lease Term to be Credited Against Original Value. The final item (numbered 6A) in the section is Total Amount of Fixed Monthly Rentals Not to be Credited Against Original Value.[2/] There is no explanation of the method by which Item 6A is computed.

2/ A representative example of the computations in this section is taken from defendants' Exhibit I:

"1. ORIGINAL VALUE OF VEHICLE.....1 $9038

2. CASH DOWN PAYMENT Credited Against Original Value (Prepaid Depreciation).....2 $0

3. NET TRADE-IN Credited Against Original Value (Prepaid Depreciation)(Complete for both open and closed-end leases).....3 $0

4. NET ORIGINAL VALUE (Item I less Items 2 and 3).....4 $9038

5. AGREED DEPRECIATED VALUE OF VEHICLE at the completion of the originally scheduled term of this lease. The agreed depreciated value of the vehicle will be compared to the net amount received from the sale of the returned vehicle at wholesale upon lease termination to establish the amount of Lessee deficiency or rebate. The MAXIMUM LESSEE LIABILITY for deficiency shall be established in accordance with the NORMAL LEASE TERMINATION provisions on the reverse side. In the event of default or premature lease termination the MAXIMUM LESSEE LIABILITY shall be determined in accordance with the DEFAULT or PREMATURE LEASE TERMINATION provisions on the reverse side.....5 $5000

6. TOTAL AMOUNT OF FIXED MONTHLY RENTALS FOR THE FULL LEASE TERM TO BE CREDITED AGAINST ORIGINAL VALUE (Depreciation Included in Fixed Monthly Rental Charges - Item 4 less Item 5).....6 $4038

6A. TOTAL AMOUNT OF FIXED MONTHLY RENTALS NOT TO BE CREDITED AGAINST ORIGINAL VALUE (Item 7A less Item 6).....6A $1374"

Items 6 and 6A are then totaled and sales tax added to arrive at total monthly charges for lease term. This amount is then divided by the number of months of the lease term to arrive at the monthly rental payment.

Determination of the nature of these agreements must begin with Title 12A O.S. §1-201(37), which defines the term "security interest."[3/] This section clearly states that whether a particular lease is intended for security is to be determined by the facts of each case. The section then goes on to provide guidelines in the case of a lease with an option to purchase. However, the leases involved here do not include options to purchase, so the guidelines referring to such options and the tests concerning nominal or substantial consideration are not applicable.

Neither is the absence of an option to purchase controlling. As the Court observed in In The Matter of Tillery, 571 F2d 1361 (5th Cir. 1978):

> "Just as the inclusion of an option to purchase does not in and of itself make the lease one intended for security; so also, the exclusion of such an option does not ipso facto make it a 'pure lease.' "

Whether an agreement is a lease intended for security is dependent on the intent of the parties as ascertained from the terms of the instrument. The fact that these agreements are denominated as leases is not a controlling factor. Stanley v. Fabricators,Inc., 459 P2d 467 (Alaska 1969).

3/ This section provides:

> " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a 'security interest'.... Unless a lease or consignment is intended as security reservation of title thereunder is not a 'security interest' but a consignment is in any event subject to the provisions on consignment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." (Emphasis supplied).

It is substance and not form which is decisive in determining whether an agreement is intended to create a security interest. In Re A & T Kwik-N-Handi, Inc., 13 UCCRS 960 (D.C. Ga. 1973). Therefore, the Court must analyze the contract to determine what rights and obligations have been created. Uniroyal, Inc. v. Michigan Bank, N.A., 12 UCCRS 745 (Mich.1972) In other words, the real test is what the contract actually does, rather than what it superficially says.

A careful look at these agreements reveals that they are indeed leases intended for security. The only interests retained by the lessor are naked title, plus the right to receive the purchase price and an amount which is apparently interest.

Under these agreements the parties have consented at the outset how much lessor is to realize from the sale of the vehicles. He is to receive from the lessee the agreed monthly payments which include interest. The remainder of the price is then obtained by sale of the vehicle at termination.

It is the lessee who has the real interest in the disposition of the vehicle. Lessor is assured by the agreement of the lessee that he will receive the original agreed value of the vehicle - no more and no less - plus an amount that is apparently interest. (Emphasis supplied). In the case of premature termination, the lessor is still assured that he will receive the original value of the vehicle plus interest, except that the interest is reduced by the "Rule of 78's." This Rule of 78's is a method used to compute interest earned by a lender when a loan, set up on monthly installments, is paid off prematurely. Bone v. Hibernia Bank, 493 F2d 135 (9th Cir. 1974).

It is true that the lessee probably will not pay the full purchase price himself because the termination value will probably be paid by a third party purchaser. However, it is lessee who will will pay any deficiency or receive any surplus. The practical effect of this arrangement is the same as if lessee purchased the car, then sold it two or three years later and used the proceeds

to pay off the note. This similarity is strengthened by the fact that all expenses incurred by lessor in selling the vehicles are are to be borne by lessee.

One of the characteristics of a lease is that, at the end of the term, the owner has the absolute right to retake control and use the property. Transamerica Leasing Corp. v. Bureau of Revenue, 450 P2d 934 (N.M. 1969). In other words, the owner, after the lease term has expired, can do as he pleases with his property. In the leases involved here, however, that is not the case. These agreements require the lessor to sell the vehicles in a commercially reasonable manner. This lends support to the conclusion that, even after the lease term has ended, the lessor is not the owner but acting as a representative of the lessee.

While it is true that these leases contain no option to purchase, lessee can, if he wishes, purchase the vehicle for the amount agreed upon at the outset. The lessee will pay, and the lessor will receive, the original agreed value plus interest, and this is true even if lessee must bid more than the agreed depreciated value, since any excess he may have to bid will be refunded under the termination provisions.

Finally, these agreements contain other indicia of a sale, indicating that they are leases intended for security.[4/] Lessee must

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4/ These provisions are as follows:

> 24. INSURANCE: Lessee shall at all times and at his sole expense obtain and maintain an insurance policy on the vehicle which provides liability insurance in the amounts of at least $100,000 for any one person for injury or death, $300,000 for any one accident for personal injury or death and $25,000 for property damage if the leased vehicle is an automobile or $50,000 for property damage if leased vehicle is a truck, and Uninsured Motorist Coverage. Such coverage is to be provided by a policy from an insurance company satisfactory to Lessor and the policy shall also name the Lessor as additional insured.
>
> Lessee shall at all times and at his sole expense also keep vehicle insured against all loss, damage or destruction due to fire, theft and physical damage. The deductible amount is not to exceed $100 for collision nor $50 for comprehensive coverage. Such coverage is to be provided by a policy from an insurance company satisfactory to Lessor and the policy shall contain a standard loss payable clause under which such insurance shall be payable in case of loss to Lessor and General Motors Acceptance Corporation as their interests may appear.

4/ (Cont'd) Lessee shall provide and pay for any other insurance or bond that may be required by any governmental authority as a condition to, or in connection with, Lessee's use of the vehicle.

Lessee shall furnish Lessor with satisfactory evidence of the above insurance.

If any mutually approved carrier refuses to issue any insurance herein required or if the Lessee fails to maintain such insurance, or if such insurance is cancelled or suspended, the Lessor, at his option, may terminate this lease and take possession of the vehicle which will be disposed of as hereinafter provided, or the Lessor may elect to attempt to procure such insurance for the Lessee. In the event that the Lessor procures such insurance the Lessee agrees to pay as an additional part of the obligation under this lease agreement an additional charge equal to the premium together with interest.

In the event the vehicle is involved in an accident, damaged, stolen or destroyed by fire, the Lessee will notify Lessor, in writing, within 24 hours and will also comply with all terms and conditions entered in the insurance policies. The Lessee agrees to cooperate with the Lessor and the insurance companies in defending against any claims or actions resulting from the Lessee's operation or use of the vehicle.

This vehicle shall not be used by any person, in any manner, or for any purpose that would cause any insurance herein specified to be suspended, cancelled, rendered inapplicable or increased in cost.

25. MAINTENANCE AND REPAIRS: Lessee shall pay for all maintenance and repairs to keep vehicle in good working order and condition and will maintain the vehicle as required to keep the manufacturer's warranty in force. The vehicle will be returned at the end of the lease period in good condition, reasonable wear and tear excepted.

26. REGISTRATION, LICENSE, EXPENSES, FEES, TAXES AND INSPECTION: Lessee shall pay all expenses incurred in the use and operation of the vehicle, including license, registration and title fees, gasoline, oil, antifreeze, repairs, maintenance, tires, storage, fines, inspections, assessments, sales or use taxes, if any, and all other taxes as may be imposed by law from time to time, except those levied on the net income of the Lessor. Lessee will reimburse and hold Lessor harmless for any and all amounts Lessor may pay in satisfaction, release or discharge thereof. Lessee shall permit Lessor and its designees to inspect the vehicle at reasonable times, places and intervals.

* * *

28. VEHICLE USE: Lessee shall keep vehicle free of all taxes, liens and encumbrances and any sum of money that may be paid by Lessor in release or discharge thereof, including legal costs, shall be paid on demand by Lessee. Lessee shall not use vehicle illegally, improperly or for hire and shall not remove vehicle outside the United States or Canada.

Vehicle shall not be altered, marked or additional equipment installed without the prior written consent of Lessor, in which case Lessee will bear the expense of restoring vehicle to its original condition.

29. TITLE: Lessee acknowledges that this is an agreement to lease only and title to the vehicle shall at all times remain in Lessor. Lessee covenants and agrees not to assign this lease without the prior written consent of Lessor nor do any act to encumber, convert, pledge, sell, assign, re-hire, lease, lend, conceal, abandon, give up possession of, or destroy the vehicle.

pay all operating, maintenance, and repair costs and he must pay all taxes and license fees. Lessee must purchase insurance satisfactory to lessor which contains a loss payable clause in favor of lessor and GMAC "as their interests may appear." Lessee is required to indemnify lessor against "all losses, damages, injuries, claims, demands and expenses arising out of the condition, maintenance, use or operation of the vehicle." Finally, the agreement may be terminated by lessee upon 30 days written notice, thus activating the premature termination provisions. Lessor, however, may only terminate the agreement upon default by lessee.

While neither party has discussed it, and there is no evidence it was ever operative, the Court notes that there is an Excess Mileage Charge paragraph in each of the agreements. This charge is 6 cents

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4/ (Cont'd) 32. DEFAULT: In any of the following default events, viz,(1) default in any payment due hereunder,(2) failure to comply with any of the terms or conditions hereof, (3) a proceeding in bankruptcy, receivership or insolvency is instituted by or against the Lessee or his property or the Lessee makes an assignment for the benefit of creditors, or (4) the Lessee fails for any reason to comply with the insurance requirements of the lease or said required insurance is cancelled prior to the expiration of this lease, the Lessor shall have the right, at his election to sue Lessee for damages or to terminate the lease and in such event Lessor may take immediate possession of the vehicle without demand and for this purpose may enter upon the premises where the vehicle may be and remove it. Lessor may take possession of any property in the vehicle at time of repossession, if such other property may be therein, and hold same for Lessee at Lessee's risk without liability on the part of the Lessor, Lessee to be liable for any charges for storing such property incurred by Lessor.

In the event of repossession, the Lessor shall have the rights and remedies as provided and permitted by law and shall dispose of the vehicle in such commercially reasonable manner as Lessor shall determine. The maximum amount of Lessee liability and any associated deficiency or rebate shall be established on the same basis as would have been applied had the Lessee himself voluntarily elected to terminate the lease prematurely as of the date of repossession as herein provided for in the PREMATURE LEASE TERMINATION provisions. Any deficiency or rebate, so determined for open or closed end leases will be in addition to any excess mileage charges, damages, or other remedies herein provided.

If it is necessary to employ the services of any attorney or incur expenses in enforcing this Lease Agreement, the Lessee shall pay to the Lessor all such expenses and court costs, in addition to all other sums due Lessor including reasonable attorney's fees.

33. INDEMNIFICATION: Lessee agrees that the rentals shall not be subject to any defenses, set-off, counterclaims or recoupment and agrees to indemnify and hold harmless Lessor and its assignees and employees from all losses, damages, injuries, claims, demands and expenses arising out of the condition, maintenance, use or operation of the vehicle.

per mile for each mile the automobile is driven more than an average of 15,000 miles per year. This is one indicia that might support a finding these are true leases but the excess mileage paragraph is inexplicable in the context of the whole agreement.

The Bankruptcy Court, in finding that these instruments were leases intended for security, relied on In the Matter of Tillery, 571 F2d 1361 (5th Cir. 1978), in which the order of the Bankruptcy Judge was adopted by the Court of Appeals. The leases involved in Tillery were very much like those involved here; in fact they were almost identical in all important respects. There, the Bankruptcy Court found:

> "The termination formula recognizes the equity of the 'Lessee', in the vehicle because he is required to bear the loss or receive the gain from its wholesale disposition. In addition, his equity extends to the retail value of the vehicle which, in effect, he is required to pay under the contract. If the contract runs through the completion of the initial term (36 months) the 'Lessor' will have received through monthly 'rental payments' the sum of $8,611.20 and is still entitled to receive the sum of $3,570.00 by direct payment from the 'Lessee' and/or from disposition of the vehicle. This constitutes a total payment of $12,181.20; and although no evidence was presented as to the retail sales price of the vehicle on April 12, 1974, it appears to be reasonable to presume that the total amount received would constitute the retail price of the vehicle plus a substantial interest charge for financing the transaction over a period of three (3) years. Mathematically, this same result would occur at an earlier termination."

The Court then observed:

> "An equity in the 'Lessee' is one of the distinctive characteristics of a lease intended for security. As stated by Judge Hiller in the case of In Re Royer's Bakery, Inc., (ED Pa., 1963) 1 UCC Rep. 342:
>
> " '...Whenever it can be found that a lease agreement concerning personal property contains provisions the effect of which are to create in the lessee an equity or pecuniary interest in the leased property the parties are deemed as a matter of law to have intended the lease as security within the meaning of Sections 9-102 and 1-201(37) of the Uniform Commercial Code."

The Court found in Tillery the instruments as a whole created rights and obligations indicating a sale rather than a true lease, and therefore were leases intended as security.

Naiman and GMAC argue strongly that Tillery was incorrectly decided. These leases, they say, create not an equity in the property, but only a secondary liability in connection with the use of the property. They emphasize the requirement that lessee return the vehicles to the lessor, and contend that any obligation of lessee beyond the lease term is an obligation to pay for the use of goods. These arguments are unpersuasive. While it is true that lessee's right to receive a refund or obligation to pay depends on the price received at sale, once the car is sold lessee's right or obligation becomes unconditional in keeping with the previously agreed upon price.

GMAC and Naiman also argue that Tillery is directly in conflict with the tests for determining whether a lease is intended for security as adopted by the Tenth Circuit and by many other courts. Percival Construction Co. v. Miller and Miller Auctioneers, Inc., 532 F2d 166 (10th Cir. 1976); Crest Investment Trust, Inc., v. Atlantic Mobile Corp., 250 A2d 246 (Md.App. 1969); Citicorp Leasing, Inc. v. Allied Institutional Distributors, Inc., 454 F.Supp. 511 (W.D. Okl.1977) These cases, it is argued, establish that these are "true leases", because the "option" price at the end of the term is greater than 25% of the original purchase price, In Re Alpha Creamery Co., Inc., 4 U.C.C.R.S. 794 (W.D.Mich.1967); Percival Construction Co. v. Miller and Miller Auctioneers, Inc., supra, and is also approximately the same as market value at the end of the lease term. The problem with applying those tests, however, is that the leases involved in those cases all contained options to purchase. The word option indicates a choice, that is, the lessee can choose whether to purchase the article or to return it to the lessor. In fact, one of the tests adopted by the Courts is whether the terms of the lease and option are such that the only sensible course for the lessee at the end of the term is to exercise the option. Citicorp Leasing, supra. In other words, where the terms of the agreement effectively leave the lessee no choice, then the agreement will be found to be a lease intended for security.

In this case, there is no "option." The rights and obligations of the parties are unconditional. Therefore, the tests for determining the effect of an option to purchase are inapplicable.

It is noteworthy as well that the cases relied on by GMAC and Naiman indicate that in order to have a true lease there must be "facts showing that the lessee is acquiring no equity in the leased article during the term of the lease." Crest, supra. Such facts are not present here.

Other cases in which agreements similar to these have been considered have reached the same conclusions as reached by the Tillery court. In Re Brothers Coach Corp., 9 U.C.C.R.S. 502 (E.D. N.Y. 1971); G. R. Pierce v. Leasing International, Inc., 235 SE2d 752 (Ga.App. 1977).

THE JUDGMENT OF THE BANKRUPTCY COURT IS AFFIRMED.

DATED this 28 day of May, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 28 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

SPECIALTY POLMYERS, INC., a Texas Corporation,

Plaintiff,

-vs-

FRONTIER ROOFING AND MATERIALS COMPANY, INC., an Oklahoma Corporation,

and

NELSON L. JOHNSON, an individual

Defendants,

Civil Action
File No. 80-C-124-C

DEFAULT JUDGMENT

The Defendants, FRONTIER ROOFING AND MATERIALS COMPANY, INC., and NELSON L. JOHNSON, have been regularly served with process. They have failed to appear and answer the Plaintiff's complaint filed herein. The Default of Defendants has been entered. It appears that the Defendants are not infants nor are they incompetent persons. An affidavit of nonmilitary service has been filed herein. It appears from the affidavit that the Plaintiff is entitled to judgment.

IT IS ORDERED AND ADJUDGED that Plaintiff recover from the Defendants and each of them jointly and severely the total amount of $11,584.00 plus interest at the rate of 6% per annum from January 1, 1980, and from the day of judgment at 10% per annum and for attorney fees in the amount of $1,500.00 plus attorney fees together with costs in the sum of $68.68 and expenses.

Dated May 28th, 1980.

(Signed) H. Dale Cook

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORAL ROBERTS UNIVERSITY, an Oklahoma non-profit corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-680-E
AFG INDUSTRIES, INC., a Delaware corporation (successor to ASG Industries, Inc.), and ASG INDUSTRIES, INC., a Delaware corporation,	)	
Defendants.	)	

O R D E R

Upon application of plaintiff, this action is hereby dismissed, without prejudice, and subject to the imposition of conditions upon refiling, if appropriate.

So ordered this 27th day of May, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 27 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

YUBA HEAT TRANSFER CORPORATION, and KANSAS CITY FIRE & MARINE INSURANCE COMPANY, a Corporation,	)	
Plaintiffs,	)	
v.	)	No. 78-C-496-C
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,	)	
Defendant.	)	

ORDER

Upon application of plaintiffs, it appearing that this matter has been settled between the parties, it is therefore ordered that the cause of action herein be dismissed with prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

MAY 27 1980

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AK:sgm
5/27/80

FINLEIGH CLOTHES, DIVISION OF J. J. JUDGE, INC., a corporation, Plaintiff, vs. STEPHEN HAGGARD, INC., a suspended corporation; STEPHEN J. HAGGARD; JAMES B. MILLS; and DAVID K. HAGGARD, Defendants.	No. 80-C-221-C

FILED
MAY 27 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

PARTIAL DISMISSAL

TO: DAVID K. HAGGARD

NOTICE is hereby given that Plaintiff elects to dismiss as to you only, without prejudice, the above entitled action pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure and hereby dismisses as to David K. Haggard only without prejudice.

Pursuant to the aforesaid Rule, said notice is filed before an answer has been filed by this particular Defendant or a motion for summary judgment.

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

By_____
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I, ALLEN KLEIN, hereby certify that I did cause to be mailed a true and correct copy of the foregoing Partial Dismissal this _____ day of May, 1980, to David L. Crutchfield of Anderson and Zirkle, 10 East Third Street, Suite 500, Tulsa, Oklahoma 74103, and to W. Samuel Dykeman of Dykeman, Williamson & Williamson, Suite 615-East, The Oil Center, 2601 Northwest Expressway, Oklahoma City, Oklahoma 73112, attorneys for Defendants, with proper postage thereon fully prepaid.

_____
ALLEN KLEIN

LAW OFFICES
UNGERMAN
CONNER,
LITTLE
UNGERMAN &
GOODMAN

1710 FOURTH NATIONAL
BANK BUILDING
TULSA, OKLAHOMA
74119

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 80-C-103-C
GATEWAY STANDARD, INC. d/b/a THE MAYO HOTEL	)	
Defendant.	)	

ORDER

This matter coming on to be heard upon the Plaintiff's Motion to dismiss the above-entitled action with prejudice and without costs, it appearing to the Court that all matters in controversy for which this action was brought having been resolved, and the Court otherwise being fully advised in the premises:

IT IS HEREBY ORDERED that the above-entitled matter be and hereby is dismissed with prejudice and without costs.

ENTER:

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

DATED:

5-27-80

NAMES AND ADDRESSES OF ATTORNEYS FOR PLAINTIFF:

MICHAEL A. CRABTREE
4115 Chesapeake Street, N.W.
Washington, D. C. 20016
202-362-1000

H. WAYNE COOPER
1200 Atlas Life Building
Tulsa, Oklahoma 74103
918-582-1211

DOCKET NO. 330

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

Keith L. Taylor v. United States of America, N.D. Oklahoma, C.A. No. 80-C-208-F 80-1223

CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 800 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68, the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979, and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, and January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective MAY 14 1980

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

APR 28 1980

DOCKET NO. 330

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

FILED

MAY 23 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By _____
Deputy Clerk

Marcia Ann Baysinger v. United States of America, N.D. Oklahoma, C. A. No. 80-C-207-F 80-1229

CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 800 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68, the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979, and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, and January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

MAY 14 1980

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

THIS IS A TRUE COPY
Edna M. Harris
Deputy Clerk
TEST
Patricia D. Howard
Clerk, Judicial Panel on
Multidistrict Litigation

Patricia D. Howard
Clerk of the Panel

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By _____
Deputy Clerk

DOCKET NO. 330

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

Alvin Alvis Thompson v. ~~United~~ States of America, N.D. Oklahoma, C.A. No. 80-C-203-F

CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 800 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68, the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979, and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, and January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

MAY 14 1980

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

Patricia D. Howard
Clerk of the Panel

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN F. BENNETT, Plaintiff, -vs- SEARS, ROEBUCK AND COMPANY, and KELLY SPRINGFIELD TIRE COMPANY, Defendants.	)	NO. 78-C-378-E
THE CHIEF FREIGHT LINES COMPANY, Plaintiff, -vs- KELLY SPRINGFIELD TIRE COMPANY, a foreign corporation, and SEARS ROEBUCK CO., a foreign corporation, Defendants.	)	NO. 78-C-389-E

FILED

MAY 23 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL OF PLAINTIFFS' COMPLAINT

NOW on this 23rd day of May, 1980, upon the written stipulation of the plaintiffs for a dismissal with prejudice of the plaintiffs' complaint, the Court having examined said Stipulation for Dismissal, finds that the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that the plaintiffs' complaint against the defendants should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the complaint of the plaintiffs against the defendants be and the same is hereby dismissed with prejudice to any further action.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY, a corporation,	)	
Plaintiff,	)	
- v -	)	No. 79-C-117-E
ALVIN MILLER and JUSTINA C. MILES, a/k/a JUSTINA C. MILLER, and RANDY GLENN REED,	)	
Defendants.	)	

FILED

MAY 23 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

MOTION FOR DISMISSAL WITH PREJUDICE

Comes now the Defendant and Cross-Petitioner, Justina C. Miles, a/k/a Justina C. Miller, and applies to the Court for an Order dismissing the cross-petition filed herein with prejudice to its refiling, for the reason that an amicable settlement of the issues has been reached by the parties.

Justina C. Miles

JUSTINA C. MILES, a/k/a
JUSTINA C. MILLER

Bencile H. Williams

BENCILE H. WILLIAMS, JR.
Attorney for the Defendant and
Cross-Petitioner Justina C.
Miles, a/k/a Justina C. Miller

OF COUNSEL:

WILLIAMS, PADDOCK & DALE
Suite 5, 2624 E. 21st Street
Tulsa, Oklahoma 74114
918/749-9994

O R D E R

Now on this 23rd day of May, 1980, there comes on for hearing the Motion for Dismissal With Prejudice of the Cross-Petition in the above styled cause of action. The Court, being fully advised of the premises, finds that such motion should be and is hereby sustained, and the Clerk is directed to spread this Order for Dismissal With Prejudice upon the proper dockets of the Court.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHRISTOPHER W. McWHIRT,) CIVIL ACTION NO. 80-C-216-E
)
Defendant.)

DEFAULT JUDGMENT

This matter comes on for consideration this 23rd day of May, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Christopher W. McWhirt, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Christopher W. McWhirt, was personally served with Summons and Complaint on April 22, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Christopher W. McWhirt, for the principal sum of $740.19 (less the sum of $175.00 which has been paid) plus interest at the legal rate from the date of this Judgment until paid.

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY, a corporation,	)	
Plaintiff,	)	
- v -	)	No. 79-C-117-E
ALVIN MILLER and JUSTINA C. MILES, a/k/a JUSTINA C. MILLER, and RANDY GLENN REED,	)	
Defendants.	)	

FILED

MAY 23 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

MOTION FOR DISMISSAL WITH PREJUDICE

Comes now the plaintiff, Allstate Insurance Company, a corporation, and by and through its attorney of record, applies to the Court for an Order dismissing the above styled cause of action with prejudice to its refiling, for the reason that an amicable settlement of the issues has been reached by the parties.

Kenneth R. Webster

KENNETH R. WEBSTER
Attorney for Plaintiff
Allstate Insurance Company

OF COUNSEL:

McKINNEY, STRINGER & WEBSTER
Ninth Floor, City Center Building
Main and Broadway
Oklahoma City, Oklahoma 73102
405/239-6444

O R D E R

Now on this 23rd day of May, 1980, there comes on for hearing the Motion for Dismissal With Prejudice of the Plaintiff in the above styled cause of action. The Court, being fully advised in the premises, finds that such motion should be and is hereby sustained, and the Clerk is directed to spread this Order for Dismissal With Prejudice upon the proper dockets of the Court.

James O. Ellison

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 22 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

CRAIG T. SUTTON,

Plaintiff,

-vs-

HYDROSTORAGE, INC., a/k/a PDM HYDROSTORAGE, INC.,

Defendant.

NO. 80-C-174-E

DISMISSAL WITH PREJUDICE

Comes now the Plaintiff, Craig T. Sutton, and dismisses the above-styled cause with prejudice to the filing of any future action hereon, acknowledging the receipt from the above named Defendant of all sums due by reason of this cause.

Craig T. Sutton
CRAIG T. SUTTON - Plaintiff

Philip K. Blough
PHILIP K. BLOUGH - Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VINCENT J. SPOSATO, Plaintiff,	)	
vs.	)	79-C-395-E
VINCENT J. HRABE, Defendant	)	

JUDGEMENT

This action came on for trial before the court and a jury, Honorable James O. Ellison, United States District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict.

It is ordered and adjudged that judgement be entered in favor of the Plaintiff, Vincent J. Sposato and against the Defendant, Vincent J. Hrabe in the sum of Five Thousand and Seven Hundred Dollars ($5,700.00).

It is so ordered this 22nd day of May, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EARL E. HENRY, JR., Plaintiff,	)	
V.	)	Case Number 79-C-36-BT
The UNITED STATES of AMERICA, Defendant,	)	
V.	)	
WILLIAM H. McKINNEY and BOB G. BROWN, Additional Defendants on Counterclaim.	)	

J U D G M E N T

Defendant William H. McKinney having been served on October 2, 1979, and no response having been filed, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Earl E. Henry, Jr., as Plaintiff, and against William H. McKinney, as an Additional Defendant on Counterclaim, in the amount of $11,652.80, plus interest at the rate of 12% per annum from May 19, 1980, until this judgment is paid in full.

DATED this 21st day of MAY, 1980.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 5.82 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Katsy Mullendore Mecum, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 78-C-629-B Tracts Nos. 246E-14, 246E-15 and 246E-16 (This is Master File #400-15)
United States of America, Plaintiff, vs. 10.16 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Katsy Mullendore Mecum, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 78-C-630-B Tract No. 401E-5 (Included in D.T. filed in Master File #400-15)

FILED
MAY 2 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

Now, on this 19th day of May, 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tracts Nos. 246E-14, 246E-15, 246E-16 and 401E-5, as such estate and tracts are described in the Complaints filed in these actions.

3.

The Court has jurisdiction of the parties and subject matter of these actions.

4.

Service of Process has been perfected personally as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in these cases.

5.

The Acts of Congress set out in paragraph 2 of the Complaints filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaints. Pursuant thereto, on December 29, 1978, the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject tracts and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tracts is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tracts and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tracts Nos. 246E-14, 246E-15, 246E-16, and 401E-5, as such tracts are particularly described in the Complaints filed herein; and such tracts to the extent of the estate described in such Complaints, are condemned, and title thereto is vested in the United States of America, as of December 29, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tracts were the defendants whose names appear below in paragraph 12; and the right to receive the just compensation for the estate taken herein in such tracts is vested in the parties so named.

12.

It is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estate condemned in subject tracts as follows:

TRACTS NOS. 246E-14, 246E-15, 246E-16 and 401E-5

OWNERS:

Katsy Mullendore Mecum, Trustee of
Trust "A" and Trustee of Trust "B"

Subject to:

A Lease owned by L & B Land and Cattle Company of Oklahoma, Inc.
and
A Mortgage owned by Equitable Life Assurance Society of the United States

Award of just compensation for both cases combined, pursuant to Stipulation --------	$20,000.00	$20,000.00
Deposited as estimated compensation:		
C.A. 78-C-629-B ---	$1,325.00	
C.A. 78-C-630-B ---	$9,950.00	
Total ----------	$11,275.00	
Disbursed to Owners ----------		None
Balance due to Owners ----------		$20,000.00
Deposit Deficiency ----------	$ 8,725.00	

13.

It Is Further ORDERED, ADJUDGED AND DECREED that the United States of America shall deposit in the Registry of this Court in civil Action 78-C-629-B, to the credit of subject tracts, the deposit deficiency in the sum of $8,725.00.

When such deficiency has been deposited the Court will enter an order allocating and disbursing the award of just compensation to the owners.

APPROVED:

UNITED STATES DISTRICT JUDGE

HUBERT A. MARLOW
Assistant U. S. Attorney

SEAGAL V. WHEATLEY
Attorney for Property Owners

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

EARL E. HENRY, JR., Plaintiff	)	
v.	)	CIVIL NO. 79-C-36-D
UNITED STATES OF AMERICA, Defendant	)	
v.	)	
WILLIAM H. McKINNEY and BOB G. BROWN, Additional Defendants on Counterclaim	)	

J U D G M E N T

There is now before the Court, defendant's Motion for Default Judgment against Additional Defendant on Counterclaim William H. McKinney. It appearing to this Court that William H. McKinney was properly served on October 2, 1979, and that no response has been filed as provided by the Federal Rules of Civil Procedure, it is hereby

ORDERED, ADJUDGED and DECREED that a judgment in the amount of $21,657.94 plus interest as provided by law be entered against Defendant on Counterclaim William H. McKinney in favor of the United States of America.

Signed this 19 day of May, 1980.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL'S COAL COMPANY, INC., et al.,	)	
Plaintiff,	)	
vs.	)	No. 80-C-187-E
BOARD OF PUBLIC UTILITIES OF THE CITY OF SPRINGFIELD, MISSOURI and CITY OF SPRINGFIELD, MISSOURI,	)	
Defendants.	)	

O R D E R

The Court has before it for consideration Defendants' Motions to Dismiss or in the Alternative to Transfer or in the Alternative to Stay, and a Motion to Strike.

On April 8, 1980, a complaint was filed by the Plaintiffs alleging breach of contract and antitrust violations. On April 23, 1980, Plaintiffs filed their first amended complaint. Plaintiff, Bill's Coal Company, Inc., is an Oklahoma corporation and Plaintiffs William D. Patch and Savanna Lee Patch are residents of Oklahoma. Plaintiffs Lloyd Burkdoll and Anna Faye Burkdoll are residents of the State of Kansas. Plaintiffs John Burkdoll and Virginia Burkdoll are also residents of Kansas. The individual Plaintiffs are partners and do business as a general partnership under the name of Cherokee Coal Company of Oklahoma. Defendant Board of Public Utilities of the City of Springfield, Missouri, is an entity established under the statutes of Missouri. Defendant City of Springfield is a Missouri corporation.

The Plaintiffs filed the complaint under §4 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §15) and §4 of the Sherman Act, as amended, (15 U.S.C. §4) seeking recovery of treble damages allegedly sustained by Plaintiffs, injunctive relief and costs for injuries to their business, property and trade caused by purchaser Defendants' monopolistic practices, unreasonable restraints of trade and other violations. The action further seeks recovery of damages from purchaser Defendants for breach of a certain coal contract.

Jurisdiction is asserted by Plaintiffs on the basis of diversity pursuant to 28 U.S.C. §1332. Plaintiffs allege proper venue for the reason that purchaser Defendants transacted and did business in this District, caused injury in this District and the claims arose in this District. The Plaintiffs allege proper personal jurisdiction under 15 U.S.C. §22, 12 O.S. Supp. §187 (1967) and 12 O.S. §1701.03 (1971).

Plaintiffs allege that a long-term contract was entered into, between the parties in 1970, whereby Plaintiff, seller agreed to sell to Defendant purchaser certain coal which was produced, mined and processed by Plaintiff seller according to Defendant purchaser's specifications, which coal was then delivered to purchaser's plants in Springfield, Missouri. Various amendments to the coal contract were entered into by the parties. In 1979, the parties entered into an Amendment which included a formula for determining the price of coal. Prior to the Amendment, Plaintiff alleges that Defendant purchaser took the position that the coal contract was invalid and refused to comply with the contract. Defendant purchaser then filed suit in the U. S. District Court for the Western District of Missouri to have the coal contract declared null and void. Thereafter Plaintiff seller filed a suit in that same court for specific performance of the coal contract and a mandatory injunction against the purchaser. During the course of the Missouri litigation, the 1979 Amendment was entered. The District Court in Missouri then rendered a decision that the coal contract was valid and enforceable.

The 1979 Amendment provided for prices for coal and further, that in each subsequent year the seller would give the purchaser three (3) months' notice of its prices for the ensuing fiscal year so that the purchaser could advertise for competitive public bids. If purchaser received a bona fide and qualified bid from a coal supplier who could supply the coal at a price at least 25% less than the seller's price, then purchaser could immediately cancel the contract.

If the purchaser received a qualified bid response from a

coal supplier who would supply the coal at a price 15% less than the seller's price, then purchaser could cancel the contract upon one (1) year's notice. The 1979 Amendment further contained a number of qualifications which were required to be met by prospective coal bidders.

Plaintiff seller alleges that purchaser combined and conspired with various coal bidders to fix the bid price of coal, to eliminate seller from the market and to attempt to monopolize the trade and commerce in coal. Seller alleges the purchaser's attempt to terminate the coal contract was void for the reason that the bids and responses thereto were not in compliance with the coal contract and the statutes, charter, and regulations governing purchaser.

An order granting Plaintiff's motion for preliminary injunction was filed in this District on April 18, 1980, for the purpose of retaining the status quo pending disposition on the merits.

A motion to dismiss or strike was filed by Defendant Board of Public Utilities on April 16, 1980, alleging that said Defendant does not have the capacity to sue or be sued.

Both Defendants joined in motions and suggestions to dismiss or in the alternative to transfer or in the alternative to stay. In the suggestion filed April 16, 1980, the Defendants allege lack of in personam jurisdiction stating that contacts are insufficient. Defendant purchasers allege they are not engaged in business in Oklahoma, nor have they entered any contracts in Oklahoma nor engage in any persistent course of conduct here. They allege their actions were entirely passive and that Oklahoma does not have sufficient minimum contacts.

Defendants argue that the contract claim and antitrust claims are compulsory counterclaims which should be asserted as such in the pending Missouri action. Defendants' contention is that the Declaratory Judgment action seeks a declaration as to the validity of the termination of the contract. The Defendants state that seller's action in this court arises out of the same transaction or

occurrence as the cause of action filed by purchaser in Missouri. For these reasons and others noted in the briefs, the Defendants request a transfer or dismissal or stay of this action pending a Missouri decision.

The Defendants state in their brief that the parties and issues involved in seller's claim under Count I and Count II are identical with the parties and issues in the complaint filed in Missouri.

Plaintiffs filed supplemental suggestions in opposition to Defendants' motions to dismiss, strike, transfer or to stay. In its suggestions, Plaintiff offered further arguments in support of its objections to Defendants' motions. Defendants filed two supplemental briefs in support of their motions.

The Court has carefully reviewed the files and briefs submitted by counsel and therefore finds the following.

The declaratory judgment action filed in the Missouri court is of importance to this court in making its determinations. That action was filed on March 28, 1980, seeking a judgment declaring that the Plaintiff has lawfully terminated the contract. The transactions and occurrences which are the subject matter of the Missouri action form the basis of and comprise the subject matter of seller's antitrust allegations and breach of contract action which is pending before this Court. The seller alleges in its complaint that the bidding procedures were improper, the breach was improper and that damages resulted to the seller. The purpose of the declaratory jdugment action is to determine the rights of the parties promptly. If the claims arise out of the transaction or occurrence which is the subject matter of the declaratory judgment action, the claims should be included in that action. See Plains Insurance Co. v. Sandoual, 35 FRD 293 (D. Colo. 1964); Collier v. Harvey, 179 F.2d 664 (Tenth Cir. 1949).

The general rule is that the first federal district court which obtains jurisdiction of parties and issues should have priority and the second court should decline consideration of

the action until the proceedings in the first court have terminated. Private Medical Care Foundation, Inc. v. Califano, 451 F.Supp. 450 (W.D. Okla. 1977); O'Hare International Bank v. Lambert, 459 F.2d 328 (Tenth Cir. 1972); Cessna Aircraft Company v. Brown, 348 F.2d 689 (Tenth Cir. 1965); National Equipment Rental Ltd. v. Fowler, 287 F.2d 43 (Second Cir. 1961). The sequence of filing is not absolutely dispositive but is a factor to be considered. Each case must stand on its own facts. Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952).

To allow the seller to maintain the instant action would seem to result in a multiplicity of litigation, unjustified expense and hardship and inconvenience to many parties and witnesses.

Title 28 U.S.C. §1404(a) provides:

> (a) for the convenience of the parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

A transfer under §1404(a) lies within the discretion of the trial court. Wm. A. Smith Contracting Co. v. Travelers Indemnity Co., 467 F.2d 662 (Tenth Cir. 1972); Metropolitan Paving Co. v. International Union of Operating Engineers, 439 F.2d 300 (Tenth Cir.), cert. denied, 404 U.S. 829 (1971); Texas Gulf Sulpher Co. v. Ritter, 371 F.2d 145 (Tenth Cir. 1967).

The purpose of §1404(a) is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Van Dusen v. Barrack, 376 U.S. 612 (1964); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, (1960).

The burden of establishing that this suit should be transferred is on the movants and unless the evidence and circumstances of the case are strongly in favor of the transfer, the Plaintiffs' choice of forum should rarely be disturbed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Wm. A. Smith Contracting Co. v. Travelers Indemnity Co., supra.

The initial concern of the Court in a §1404(a) proceeding is

whether the action "might have been brought" in the first instance in the transferee district. See Continental Grain Co. v. Barge FBL-585, supra; Hoffman v. Blaski, 363 U.S. 335, (1960). The declaratory judgment action which concerns the same contract and breach already brought in Missouri is conclusory that this action might have been brought there. The seller contends in its brief that venue is proper in this district; however, venue is proper in the Missouri district. The Court concludes that this action might have been brought in the Western District of Missouri, as there is proper diversity of citizenship between the parties, and venue in that district would have been proper under 28 U.S.C. §1391(a).

The first factor under 1404(a) that the Court must consider in determining the motion to transfer or change of venue is the convenience of the parties. Defendants herein are Missouri corporations and entities whereas Plaintiffs are Oklahoma and Kansas residents. The declaratory judgment action in Missouri already pending is a compelling factor from the convenience standpoint. The transferee court's familiarity with the facts of the case will be helpful to its progress. Duplication of discovery efforts can be avoided by proper judicial coordination.

The next consideration under §1404(a) is the convenience of the witnesses. This is also to be considered in light of the Missouri action. A transfer of a civil case on the grounds of convenience of parties and witnesses is within the sound discretion of the trial court. Pope v. Missouri Pacific Railway Co., 446 F.Supp. 447 (Okla. 1978); Northwest Animal Hospital, Inc. v. Earnhardt, 452 F.Supp. 191 (Okla. 1977).

The third standard to be considered under 28 U.S.C. §1404(a) is the "interest of justice" which the Court finds most compelling in the case at hand. The relevant considerations include relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining willing witnesses, the familiarity of the transferee court with

the applicable state law in diversity cases, and all other practical problems that make trial of a case easy, expeditious and inexpensive. Northwest Animal Hospital v. Earnhardt, supra.

"In the interest of justice" includes an element that if a similar action is pending in another district, transfer may be proper.

> "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different district courts leads to the wastefulness of time, energy and money that §1404(a) was designed to prevent." Continental Grain Co. v. Barge FBL-585, supra.

As a general rule, cases should be transferred to districts where related actions are pending since the reason for the rule is consolidation of related actions. Securities v. 1st Nat'l Finance Corp., 392 F.Supp. 239 (D.C. Ill. 1975). The presence of a related case in the transferee forum is a powerful reason in granting a change of venue. Blanning v. Tisch, 378 F.Supp. 1058 (D.C. Pa. 1974). Litigation of related claims in the same tribunal is strongly favored for many reasons. Pretrial discovery can be conducted efficiently, witnesses can be saved time and money, duplicitous litigation can be avoided which would serve the public interest and inconsistent results can be eliminated. Schneider v. Sears, 265 F.Supp. 257 (D.C. N.Y. 1967).

§1404(a) which provides for the convenience of parties and witnesses, in the interest of justice, is also applicable to civil actions brought under the antitrust laws, so that transfer may be proper. Paramount Pictures v. Rodney, 186 F.2d 111 (Third Cir. 1951), cert. denied 340 U.S. 953, 71 S.Ct. 572, 95 L.Ed. 687; Cinema Amusements v. Loews, Inc., 85 F.Supp. 319 (D.C. Del. 1949).

§4 of the Clayton Act provides that venue is proper in the district when the Defendant resides or is found or has an agent. Both parties have set forth arguments regarding the appropriate forum for venue considerations. The liberal venue provisions of the Clayton Act afford Plaintiff a broad choice

as to forum, however, the appropriateness of that choice is to be measured by standards of §1404(a). McGuire v. Singer Co., 441 F.Supp. 210 (D.C. Virgin Islands, 1977); Ex Parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949). Notwithstanding the special venue provisions of the Clayton Act, a civil antitrust action may be transferred pursuant to 28 U.S.C. §1404(a). McGuire v. Singer Co., supra; Smithkline Corp. v. Sterling Drug, Inc., 406 F.Supp. 52 (D. Del. 1975); 1 Moore's Federal Practice §§.144[15], .145[4.-1]. The trial court, in its discretion, has the authority to transfer antitrust actions. U.S. v. National City Lines, Cal. & Ill., 337 U.S. 78, 69 S.Ct. 955, 93 L.Ed. 1226 (1949), concurred in 337 U.S. 55, 69 S.Ct. 959, 95 L.Ed. 1207.

In this case, the transferee court has subject matter jurisdiction and constitutes a district where the antitrust claims might have initially been brought.

The U.S. District Court for the Western District of Missouri, Southern Division, has recently overruled a motion to dismiss filed by the seller. That court is now in a position to move ahead with the issues. If this Court retained jurisdiction and venue then it is possible that inconsistent results may occur. By maintaining separate actions, the additional consideration of judicial economy would be defeated.

In the Court's judgment, an application of the triple standard of 28 U.S.C. §1404(a), i.e., convenience of the parties, convenience of witnesses, and the interest of justice, favors a transfer to the U.S. District Court for the Western District of Missouri.

Accordingly, the Defendants' Motion to Transfer is hereby granted. The Clerk of the Court is directed to forthwith take the necessary actions to effect the transfer of this case to the U.S. District Court for the Western District of Missouri.

It is so Ordered this 19th day of May, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARIE FAYE EVANS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-327-E
	)	
HARTFORD LIFE INSURANCE COMPANY, a Massachusetts corporation, and DICK TANNER,	)	
	)	
Defendants.	)	

JUDGMENT

Upon consideration of the pleadings, the briefs presented by counsel for the parties, and the evidence offered at the trial of the issues, as is more fully set out in the Findings of Fact and Conclusions of Law filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be and hereby is granted in favor of the Defendant, Dick Tanner, and against Plaintiff, Marie Faye Evans, on Plaintiff's claims in this action against such Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be and hereby is granted in favor of the Plaintiff, Marie Faye Evans, and against Defendant, Hartford Life Insurance Company, a Massachusetts corporation, in the amount of $24,000.00, together with her costs and reasonable attorneys' fees.

IT IS FURTHER ORDERED that attorneys' fees shall be awarded upon application and hearing.

IT IS SO ORDERED this 16th day of May, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIM ZOLLIE JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
GEORGE WILKINSON, Warden,
United States Penitentiary,
Leavenworth, Kansas 66048,
COMMUNITY PROGRAMS OFFICER,
United States Bureau of Prisons,
South Central Region,
Dallas, Texas,

Respondents.

No. 80-C-223-B

74-CR-80

O R D E R

Petitioner, Jim Zollie Johnson, seeks a writ of habeas corpus pursuant to 28 U.S.C. §2241. Petitioner alleges that the respondents are violating the policy statement concerning parolee's transfer to a Community Treatment Center, by allowing his transfer to the Community Treatment Center in Oklahoma City, Oklahoma, only 29 days prior to his release instead of 120 days provided for in the policy statement.

Petitioner names as respondents the Warden of the United States Penitentiary in Leavenworth, Kansas, and the Community Programs Officer located in Dallas, Texas. He files his petition in this Court, alleging that jurisdiction is proper in that this is the sentencing court.

While such a petition is cognizable in Federal District Courts, 28 U.S.C. §2241 allows the granting of writs of habeas corpus only "within their respective jurisdictions." Therefore, this Court may only consider this petition if it has jurisdiction over the petitioner or his custodian. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); McCoy v. United States Board of Parole, 537 F2d 962 (8th Cir. 1976); Wright v. United States Board of Parole, 557 F2d 74 (6th Cir. 1977); Blau v. United States, 566 F2d 526 (5th Cir. 1978); Andrino v. United States Board of Parole, 550 F2d 519 (9th Cir. 1977); Fore v. United States, 436 F.Supp. 769 (E.D. Tenn. 1977).

In this case, petitioner is confined in Kansas. Further, both the Warden of Leavenworth Penitentiary and the Community Programs Officer are outside the jurisdiction of this Court.

Therefore, Jim Zollie Johnson's petition for writ of habeas corpus is dismissed without prejudice to filing in the proper court.

ORDERED THIS 16th day of May, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

C.F. WILLIAMS, Individually and as Trustee and Beneficiary of the C.F. Williams Trust, and JEANNE V. WILLIAMS, Individually and as Trustee and Beneficiary of the Jeanne V. Williams Trust,

Plaintiffs,

-vs-

DEAN WITTER REYNOLDS, INC., a Delaware Corporation, and FRANK HAYFORD,

Defendants.

NO. 79-C-136-E

FILED

MAY 16 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF
DISMISSAL WITH PREJUDICE

Come now the Plaintiffs herein, C.F. Williams, individually and as trustee and beneficiary of the C.F. Williams Trust, and Jeanne V. Williams, individually and as trustee and beneficiary of the Jeanne V. Williams Trust, and hereby dismiss the above styled and numbered cause of action against Dean Witter Reynolds Inc., a Delaware Corporation, and Frank Hayford, defendants herein, with prejudice.

Dated this 2nd day of May, 1980.

C.F. Williams
C.F. Williams, Individually

C.F. Williams
C.F. Williams, as Trustee and Beneficiary of the C.F. Williams Trust

Jeanne V. Williams
Jeanne V. Williams, Individually

Jeanne V. Williams
Jeanne V. Williams, as Trustee and Beneficiary of the Jeanne V. Williams Trust

GEO. P. STRIPLIN, INC.,

BY: Geo. P. Striplin
Geo. P. Striplin
Attorney of Record for Plaintiffs

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By Sam G. Bratton II
Sam G. Bratton II
Attorney of Record for Defendant
Dean Witter Reynolds, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VIKING PETROLEUM, INC., Plaintiff,	)	
vs.	)	No. 79-C-366-Bt
PERPETUAL PIPELINE OF AMERICA, LTD., Defendant.	)	

ORDER

This action comes before the Court on the Stipulation of Dismissal filed herein between the parties. It appearing to the Court that the parties have resolved all differences arising from the transactions set forth in the complaint,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint is hereby dismissed with prejudice in all regards.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

APPROVED AS TO FORM:

Lawrence A. G. Johnson
Attorney for Plaintiff

SNEED, LANG, ADAMS,
HAMILTON, DOWNIE & BARNETT

By
William J. Wenzel
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-607-BT
W. A. MAXSON d/b/a MAXSON SALES COMPANY, Defendant.	)	

ORDER OF DISMISSAL

Now on this 16 day of May, 1980, the Court has for consideration the Joint Stipulation for Dismissal filed by the plaintiff and the defendant. Upon consideration thereof, and for good cause shown,

IT IS ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is dismissed with prejudice to refiling, each party to bear its own costs.

S/ THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAMEO ATTRACTIONS, INC.,	§	
	§	
Plaintiff	§	
	§	
VS.	§	
	§	CIVIL ACTION NO. 80-C-8-B
CARUTH C. BYRD, d/b/a	§	
CARUTH C. BYRD PRODUCTIONS,	§	
INC., and DATON BAKER,	§	
	§	
Defendants.	§	

ORDER OF DISMISSAL

On this day the Court considered Plaintiff's Motion to Dismiss, and the Court was of the opinion that same should be granted;

It is, accordingly, ORDERED, ADJUDGED and DECREED that the above-entitled and numbered cause is dismissed with prejudice, and that Plaintiff shall pay the costs of court.

SIGNED this the 16 day of May, 1980.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BRUCE DENTON, d/b/a GREAT WESTERN LAND AND CATTLE COMPANY,

Defendant.

No. 80-C-89-B

FILED
MAY 16 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

This action came before the Court on Motion of Plaintiff for Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure. Subsequent to the filing of the complaint in this action the defendant was served with a summons and complaint as required by law. However, defendant has defaulted in that he has not answered the complaint herein on file and the time to answer such complaint has expired. It further appears that default was entered against defendant on May 8, 1980, and that no proceedings have been taken by defendant since entry of his default.

Therefore, it is ORDERED and ADJUDGED by the Court that plaintiff recover from defendant the sum of $729.68, with interest at the rate of twelve percent (12%) per annum from February 16, 1979, until paid, together with costs, including a reasonable attorneys fee in the amount of $1,500.00, to be taxed by the clerk of this Court.

DATED May 16, 1980.

Judge of the United States District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
FRANK L. KASECA, Defendant.	)	CIVIL ACTION NO. 80-C-239-B

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 15th day of May, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-19-B
FRED JACKSON, et. al., Defendants.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 13th day of May, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 13th day of May, 1980.

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VULCAN ENERGY CORPORATION, an Oklahoma corporation,

Plaintiff,

vs.

FALCON ENGINEERING COMPANY, INC., a Texas Corporation,

Defendant.

No. 79-C-409-~~BT~~ E

ORDER OF DISMISSAL WITH PREJUDICE AND NOTIFYING CLERK TO DISBURSE MONIES ON DEPOSIT

This action comes before the Court upon the Stipulation of Dismissal with Prejudice and request by the parties to order the Clerk to disburse monies held. It appearing to the Court that the parties have stipulated to and agreed upon the dismissal with prejudice of all claims and counterclaims asserted by each against the other, and further that the parties have requested the Court to order the Clerk to disburse to Plaintiff those funds deposited with the Court on September 13, 1979, in the principal amounts of $20,000.00 and $12,500.00,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action and all claims and counterclaims asserted herein by each party against the other are hereby ordered dismissed with prejudice, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court is directed to forthwith deliver to Plaintiff in this action those monies deposited with the Clerk on September 13, 1979, in the principal amounts of $20,000.00 and $12,500.00, together with all interest accrued thereon.

DONE this 13th day of May, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENTS:

SNEED, LANG, ADAMS,
HAMILTON, DOWNIE & BARNETT

By _____
William J. Wenzel
Attorneys for Plaintiff

JONES, GIVENS, GOTCHER,
DOYLE & BOGAN, INC.

By _____
Deryl L. Gotcher
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OFFICE OVERLOAD, INC., A Delaware corporation, Plaintiff, vs. HANNAH L. MILLER, JOHN H. MAXWELL, JR., DUNHILL PERSONNEL OF TULSA, INC., an Oklahoma corporation, and DUNHILL TEMPS, an association of unknown character, Defendants.	)	No. 79-C-231-CE

ORDER

This action comes before the Court on the stipulation of the parties to dismiss this action,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be dismissed.

DONE this 13th day of May, 1980.

S/ JAMES O. ELLISON
JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENTS:

SNEED, LANG, ADAMS, HAMILTON, DOWNIE & BARNETT

By _____
William J. Wenzel
Attorneys for Plaintiff

JONES, GIVENS, GOTCHER, DOYLE & BOGAN, INC.

By _____
A. Kent Morlan
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 80-C-185-B
JAMES ARTHUR BOYD, et. al., Defendants.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 12th day of May, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 12th day of May, 1980

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLENN CARNELL MORRIS, Petitioner,	)	
vs.	)	No. 80-C-127-E
THE STATE OF OKLAHOMA, Respondent.	)	

O R D E R

Petitioner, Glenn Carnell Morris, was convicted in the District Court of Tulsa County, State of Oklahoma, in case number CRF-75-683, of the crime of Robbery With Firearms. The case was tried to a jury and Petitioner was sentenced to a term of fifty (50) years in prison. Petitioner duly appealed his conviction to the Oklahoma Court of Criminal Appeals, and his conviction was affirmed, but his sentence modified from fifty (50) to thirty (30) years, Case No. F-77-558 (July 2, 1979). Petitioner's petition for rehearing was denied by the Court of Criminal Appeals by Order dated July 23, 1979.

On March 14, 1980, Petitioner instituted this action, seeking a writ of habeas corpus pursuant to 28 U.S.C. §2254, and on March 19, 1980, an Order was entered directing the State to respond to the Petition. The State's response was filed on April 16, 1980.

The State concedes that Petitioner has exhausted his available state remedies, and the Court is in agreement that Petitioner has satisfied the exhaustion requirement.

Petitioner's claims can be summarized as follows:

(1) A certain voluntary, unsolicited statement by a police officer while testifying as the State's witness was prejudicial, entitling Petitioner to a new trial;

(2) The prosecutor's comments in closing argument on Petitioner's failure to call certain police officers as witnesses was prejudicial, entitling Petitioner to a new trial;

(3) The prosecutor committed highly prejudicial error, thereby depriving Petitioner of a fair trial when he questioned Petitioner about whether he had paid income taxes for certain years;

(4) The prosecutor injected prejudicial error into the case by misstating the law as to reasonable doubt during his voir dire of the jury;

(5) The trial court erred in failing to suppress the in-court identification of the Petitioner, because of inconsistencies in prior description of the Petitioner by the victim;

(6) The line-up was subject to subtle manipulation by officers and was conducive to misidentification;

(7) The trial court erred in admitting testimony concerning a pistol and marijuana found in the possession of the co-defendant in that the prejudicial effect of these items outweighed their probative value;

(8) The warrantless arrest of the Petitioner was not based upon probable cause, and the warrantless search incident thereto was unreasonable, requiring that all evidence produced thereby be suppressed; and

(9) Certain remarks by the prosecutor inferred that Petitioner had made incriminating statements to him, thereby denying Petitioner his right to a fair trial.

The transcript of the state proceedings in this case was received with the State's response. The Court, having reviewed the entire file in this matter, including the transcript, concludes that this matter is now ready for dispositive ruling.

In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963), the Supreme Court laid down the test applicable to a determination of whether the petitioner was entitled to an evidentiary hearing:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is

> not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313, 83 S.Ct. at 757. See also 28 U.S.C. §2254(d); Rule 8, Rules Governing §2254 cases.

In reviewing the record, under the test of Townsend, the Court finds that an evidentiary hearing is not necessary in this case.

Petitioner's First, Second, Third, Fourth, Seventh, and Ninth claims raise questions concerning trial errors. It is settled that habeas corpus relief is not available to set aside a conviction on the basis of trial errors unless exceptional circumstances are present so that the errors render the trial "so fundamentally unfair as to deny [Petitioner] due process." Donnelly v. De Christoforo, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974).

Upon review of the transcript in this case, as a whole, the Court is of the opinion that these errors do not rise to the level of constitutional claims cognizable under section 2254. See, e.g., Talamante v. Romero, ____ F.2d ____ (Tenth Cir. No. 79-1328, May 5, 1980)(Slip Opinion at 15-16); Cobb v. Wainwright, 609 F.2d 754, 755 (Fifth Cir. 1980); Davis v. Campbell, 608 F.2d 317, 319 (Eighth Cir. 1979); Brinlee v. Crisp, 608 F.2d 839, 843, 850 (Tenth Cir. 1979); Gillihan v. Rodriguez, 551 F.2d 1182, 1192-1193 (Tenth Cir. 1977) cert. denied 434 U.S. 845, 98 S.Ct. 148 (1977); Latham v. Crouse, 320 F.2d 120, 123 (Tenth Cir. 1963), cert. denied 375 U.S. 959, 84 S.Ct. 449 (1963); Martley v. Douglas, 463 F.Supp. 4, 8 (W.D. Okla. 1977); Young v. State of Oklahoma, 428 F.Supp. 288, 293-294 (W.D. Okla. 1976); Robinson v. State of Oklahoma, 404 F.Supp. 1168, 1171-1172 (W.D. Okla. 1975).

Petitioner's Fifth and Sixth claims attack the line-up utilized by the State and the trial court's failure to suppress the victim's in-court identification of the Petitioner. The

Petitioner bases his Fifth claim primarily upon certain discrepancies in the description of Petitioner given by the victim, concerning the existence of facial hair on the Petitioner.

Petitioner's claims in this regard are controlled primarily by Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977), and Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). In United States v. Williams, 605 F.2d 495 (Tenth Cir. 1979), cert. denied 100 S.Ct. 276 (1979), the court said:

> Manson as well as Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, and United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, stand for the proposition that a suggestive confrontation does not in and of itself require suppression. The totality of the circumstances must be considered to determine whether sufficient independent basis for the identification leads one to conclude that the identification is reliable.

The transcript in this case discloses that the method used in conducting the line-up was the subject of intensive inquiry, at the preliminary hearing, the hearing of pre-trial motions, and at trial. Additionally, a photograph of the line-up in this case is preserved as "State's Motion Exhibit #1".

Assuming for the purpose of this Petition that the procedures utilized in this case resulted in a prejudicially suggestive process, the factors to be considered by the Court are found in Neil v. Biggers, supra:

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. at 199, 93 S.Ct. at 382.

The transcript discloses that the robbery in this case occurred in the early morning hours (approximately 6:30 a.m.) of March 27, 1975. The victim was the attendant at a convenience store, Fast Eddy's Food Store. Two men entered the store, approaching the attendant, who was then behind the counter.

One of the men grabbed the attendant by the collar, brandished a pistol, and ordered him to open up the cash register. The attendant was then ordered to lie on the floor. The entire incident took approximately two or three minutes.

The description given by the attendant to the officers was a fairly accurate one, under the circumstances. The attendant's uncertainty went to the existence of, or the type of, facial hair on the gunman. Although initially, the gunman was not described as bearded, the detective investigating the crime testified that the attendant did later describe the gunman as having "scraggly" facial hair, a mustache or "something". The attendant did, however, at trial identify with certainty the Petitioner as the gunman. Finally, the Court notes that the line-up at which Petitioner was identified was conducted shortly after the robbery, that is, within a few days.

In considering the factors of Biggers, supra, and Manson, supra, as applied to this case, the Court cannot conclude that under these circumstances a substantial likelihood of misidentification existed. The identification was properly placed before the jury, and any questions as to its weight properly for the jury's consideration.

Petitioner's Eighth claim concerns his Fourth Amendment claims relating to the admissibility of certain evidence seized pursuant to a warrantless arrest. The State's response is to contend that Petitioner has had a "full and fair" opportunity to present these claims, and cannot now raise them, citing Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976). The State's position is well taken. The Petitioner's Fourth Amendment claims were raised at trial and upon appeal. The transcript discloses that at the trial court level, Petitioner was afforded an opportunity to develop, and did develop fully the facts surrounding his arrest and the seizure of the items complained of. The Court of Criminal Appeals found the seizure

of the coat from Petitioner's residence to be justifiable on the basis of the "plain view" doctrine, but found the seizure of the Petitioner's wallet containing the address book that linked Petitioner to his co-defendant to be improper. However, the court concluded that the introduction of the address book was harmless, non-reversible error.

Under Stone v. Powell, supra, the focus is upon whether Petitioner was afforded an opportunity for a "full and fair" hearing of his Fourth Amendment claims. If Petitioner was, then his petition may not be entertained, e.g., Sanders v. Oliver, 611 F.2d 804, 807-808 (Tenth Cir. 1979). The fact that the state courts, in considering the claim, have concluded that any error is harmless has no bearing on the issue of whether the opportunity mandated by Stone v. Powell was provided, e.g., McDaniel v. State of Oklahoma, 582 F.2d 1242, 1244 (Tenth Cir. 1978), cert. denied 99 S.Ct. 462 (1978).

Accordingly, the Court concludes that Petitioner's Eighth claim is not cognizable in this proceeding.

Based upon its consideration of the file, transcripts and relevant authorities, the Court concludes that the petition must be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254 be, and the same hereby is, denied.

It is so Ordered this 12TH day of May, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
ERNEST R. YARBROUGH, Defendant.	)	CIVIL ACTION NO. 80-C-143-E

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of May, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Ernest R. Yarbrough, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Ernest R. Yarbrough, was personally served with Summons and Complaint on March 26, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Ernest R. Yarbrough, for the principal sum of $1,835.23, plus the accrued interest of $359.40, as of November 6, 1979, plus interest at 7% from November 6, 1979, until the date of Judgment, plus interest at the legal rate on the principal sum of $1,835.23, from the date of Judgment until paid.

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOYCE L. MACIAS, Plaintiff,	)	
v.	)	No. 80-C-57-C (77-Cr-37-C)
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

This is an action under Title 28 U.S.C. §2255 in which plaintiff seeks credit for nine months jail time prior to and during her trial in this Court in Case No. 77-Cr-37-C. The facts are as follows.

On April 9, 1975, the United States District Court for the Southern District of California issued a felony warrant for plaintiff's arrest in Case No. 75-0598, charging her with drug conspiracy violations. On September 29, 1976, plaintiff was arrested by city police in Tulsa, Oklahoma, resulting in felony drug charges being filed against her on October 1, 1976 in Case No. CRF-76-2637 (in Tulsa County District Court, State of Oklahoma). Bond was set at $5000 on the state charge, which plaintiff never made. On September 30, 1976, a detainer was placed against plaintiff for the California federal charges (Case No. 75-0598). On March 2, 1977, plaintiff was indicted in this Court in Case No. 77-Cr-37-C, with bond set at $20,000 cash or surety. During plaintiff's trial in this Court in 77-Cr-37-C, various Writs of Habeas Corpus ad Prosequendum were issued to compel her presence in this Court, and her appearance at certain related matters such as medical examinations. During that time, from September 29, 1976, to June 10, 1977, plaintiff remained a state prisoner on the state charges in Case No. 75-0598.

After a jury trial in this Court on 77-Cr-37-C, plaintiff was found guilty on four counts in a conspiracy to distribute heroin. She was sentenced on June 10, 1977 to twelve years on three of the counts with special parole terms of seven years in

each, a $5000 fine on one count, and a four year term on the remaining count, all counts to run concurrently. Plaintiff seeks credit on her twelve year sentence for the nine months spent in Tulsa County Jail, arguing that:

> In September 1976, I was arrested by Oklahoma State authorities on a [sic] unrelated drug charge. Upon being booked in to the Tulsa County Jail, I was recognized by DEA SA Zablonski (?) [sic] who then placed a "No-Bail" detainer against me, which denied me the opportunity of posting bond. Subsequently, I have had to remain in jail continuously since that time. For this reason I sincerely believe I am entitled to the nine months I remained in jail awaiting trial on 77-Cr-37.

The only detainer in the record in this case is Appendix A to the Response to this Motion by the defendant United States. That detainer is one issued by the United States Marshall in Tulsa, Oklahoma for a warrant, styled as follows:

Warrant #SD Calif: #75-0598

The only detainer on plaintiff's release from the Tulsa County Jail, therefore, was one relating to the Southern District of California charge. To the extent that plaintiff would be entitled to credit because of a federal detainer, she is not entitled to credit for a detainer based on a different charge filed more than a year earlier in another federal jurisdiction.

As for the time that plaintiff appeared in this Court under a Writ of Habeas Corpus ad Prosequendum, the record shows that in those appearances, custody was merely borrowed from the State of Oklahoma. Under such circumstances, plaintiff is not entitled to credit. Parks v. U.S., 369 F.Supp. 1163 (N.D. Okla. 1973).

For the foregoing reasons, plaintiff's Motion to Correct Sentence will be overruled.

It is so Ordered this 8th day of May, 1980.

H. DALE COOK
Chief Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GERALD GRESHAM, Plaintiff, vs. NEILL-PRICE CONSTRUCTION CO., and NEILL-PRICE INTERNATIONAL, INC., Defendants.	74-C-427-BT 76-C-460-BT (Cons.)

JUDGMENT

Pursuant to the Order filed this date, IT IS ORDERED Judgment be entered in favor of the defendants, Neill-Price Construction Co. and Neill-Price International, Inc., and against the plaintiff, Gerald Gresham.

ENTERED this 8 day of May, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUIS B. ZAMBON and CLEO S. ZAMBON,	)	
Plaintiffs,	)	
vs.	)	No. 79-C-669-E
GEORGE S. LAMBERT, d/b/a LAMBERT ENTERPRISES,	)	
Defendant.	)	

J U D G M E N T

This matter comes on on the plaintiffs' Motion for Summary Judgment and the Court, having considered the affidavits, depositions, pretrial memorandum and the files and proceedings had in this action, finds that the plaintiffs' Motion should be sustained and thereupon enters the following findings and conclusions:

1. The Court has jurisdiction of the parties and of this action under 28 U.S.C. §1332 in that the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and is between citizens of different states.

2. On July 18, 1978, the plaintiffs loaned the sum of $25,000.00 to the defendant and the defendant executed and delivered to the plaintiff his promissory note and contract for security thereof, a copy of which is attached as Exhibit 1 to the Complaint herein, which note and contract is the basis for this action.

3. The note and security agreement of the defendant was to be performed wholly within the State of Oklahoma.

4. The note and contract for security thereof of the defendant is in default in that the defendant has not paid the

interest installment due August 18, 1979, and there is now due, owing and unpaid from the defendant to the plaintiffs thereon the sum of $25,000.00 together with interest thereon at 15% per annum from August 18, 1979, until paid, and a reasonable attorney's fee in the amount of $2,500.00 and plaintiffs are entitled to judgment against the defendant in this amount.

5. The plaintiffs have a good and valid lien upon all of the interest of the defendant in and to an oil and gas lease covering:

> All of the North Half (N/2) of the Northwest Quarter (NW/4) of Section Thirty-two (32), Township 21 North, Range 13 East, Tulsa County, Oklahoma, containing 80 acres, more or less,

which lien secures the payment of the indebtedness from the defendant to the plaintiffs and the plaintiffs are entitled to a judgment foreclosing their lien upon the defendant's leasehold interest, with appraisement, as provided by law.

6. The law of the State of Oklahoma applies to the transaction which forms the basis of this action and is to be applied in this action.

7. The note and contract for security thereof upon which this action is founded is not usurious under the law of the State of Oklahoma, Oklahoma law providing for a maximum permissible interest rate of 45% in non-consumer transactions. Therefore, there being no genuine issue as to any material fact and the plaintiffs being entitled to a judgment against the defendant as a matter of law,

IT IS ORDERED AND ADJUDGED that the plaintiffs, Louis B. Zambon and Cleo S. Zambon, recover of the defendant, George S. Lambert, the sum of Twenty Five Thousand Dollars ($25,000.00), with interest thereon at the rate of fifteen percent (15%) per annum from August 18, 1979, until paid, an attorney's fee in

the amount of Two Thousand Five Hundred Dollars ($2,500.00), and the cost of the action; and, that said amounts are secured by a lien upon all of the interest of the defendant, George S. Lambert, in and to an oil and gas lease covering:

> All of the North Half (N/2) of the Northwest Quarter (NW/4) of Section Thirty-two (32), Township 21 North, Range 13 East, Tulsa County, Oklahoma, containing 80 acres, more or less,

and that any and all right, title or interest which the defendant, George S. Lambert, has, or claims to have in and to said leasehold interest in or to said real estate and premises, is subordinate, junior and inferior to the lien of the plaintiffs; and,

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the lien of the plaintiffs in the amounts above found and adjudged be foreclosed and a special execution and order of sale issue out of the office of the Court Clerk in this cause, directed to the Marshal to levy upon, advertise and sell, after due and legal appraisement, the leasehold estate and premises above described and upon sale to pay the proceeds of said sale to the Clerk of this Court, as provided by law, for application to the payment of the judgment and lien of the plaintiffs in the amounts set out, and the balance, if any, to be paid to the Clerk of this Court to await the further order of the Court; and,

IT IS FURTHER ORDERED AND ADJUDGED by the Court that upon confirmation of said sale, the defendant herein be forever barred, foreclosed and enjoined from asserting or claiming any right, title, interest, estate of equity of redemption in or to said oil and gas leasehold estate and premises, or any part thereof.

ENTERED this 8th day of May, 1980.

S/ JAMES O. ELLISON

JAMES O. ELLISON, District Judge

APPROVED:

s/ Donald E. Hammes

Attorney for Plaintiffs

s/ Gordon L. Patten

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHARON L. GREGG, Plaintiff, vs. BIG SKY FARMERS AND RANCHERS MARKETING COOPERATIVE OF MONTANA, a Montana Corporation, and RAY M. VERNON, Defendants.	)	No. 79-C-464-BT

ORDER

This diversity action was originally commenced in this Court on July 20, 1979, as a result of a vehicular accident which occurred in Oklahoma on August 2, 1977. Simultaneously with the filing of the complaint, plaintiff caused two summons to issue for service by Certified Mail by the United States Marshal. The file reveals the summons directed to Dick Logan, d/b/a Big Sky Farmers and Ranchers, a corporation, was receipted by a Robert Smith on July 25, 1979; the summons directed to Ray Vernon was returned with the notation on the envelope "Unable to Deliver."

On August 9, 1979, the defendants filed a Special Appearance, Motion to Quash and Motion to Dismiss. Defendants attacked jurisdiction and venue as well as the service of the summons, alleging insufficient answer date. On November 16, 1979, the Court granted the defendants' Motion to Dismiss with the proviso plaintiff file an Amended Complaint within 15 days properly alleging jurisdiction and concisely pleading the entity plaintiff sued, whether corporate; Dick Logan, individually, or both. The Order additionally provided ruling on the Motion to Quash be abated pending filing of the Amended Complaint.

On November 30, 1979, plaintiff complied with the Order of the Court and filed her Amended Complaint. Plaintiff, without leave of Court and without a ruling on the Motion to Quash, issued Alias Summons on December 3, 1979, directed to Ray Vernon (hereinafter referred to as "Vernon") and Big Sky Farmers &

Ranchers Marketing Cooperative, a Montana corporation (hereinafter referred to as "Big Sky") [serve Harold Goolsdee, Registered Service Agent] with directions that the United States Marshal complete personal service. The Return of Summons as to both defendants reflects non-service, i.e., (i) Vernon--"Subject not known at above address"; and (ii) Big Sky--"No such address in Artesia or Cerritos." The Marshal's Return reflects service was attempted on December 5, 1979.

On December 21, 1979, the Court, ruling on the Motion to Quash, stated:

> "Plaintiff has elected to have alias summons issued and the alias summons becomes the original summons. Lake v. Lietch, 550 P2d 935 (Okl. 1976); Jones v. Hammons, 420 P2d 870 (Okl. 1966); Marsk v. McCune Construction Company, 270 P2d 560 (Okl. 1962); Parton v. Iven, 354 P2d 210 (Okl. 1960)."

In the same Order the Court overruled the Motion to Quash previously abated as being moot.

On December 20, 1979, plaintiff caused to be issued another Alias Summons directed to Big Sky [serve Harold Goolsdee, Registered Service Agent] to be served by the United States Marshal by mailing same by certified mail. The file reflects a Return Receipt signed by a Robert Smith, the same individual receipting for service on July 25, 1979. Plaintiff did not attempt to serve Vernon again.

Big Sky has filed a Special Appearance and Motion to Dismiss averring:

(i) The plaintiff's purported cause of action is barred by operation of the Statute of Limitations, being Title 12 O.S. §95(3);

(ii) The purported Alias Summons was not issued, served or returned according to law.

At oral argument on the pending motion on April 18, 1980, defendant's counsel stated it was defendant's position the purported service of summons was fatally defective in that it did not follow the statutory answer time,i.e., requiring an answer date in less than 30 days from the summons issuance date as provided in Title 12 O.S.Supp. 1973 §155(c). Counsel further

stated at no time had the corporate defendant questioned the service receipted for by Robert Smith.

Counsel for plaintiff stated at oral argument the reason for the issuance of the first Alias Summons after the Amended Complaint was filed was his belief he had substituted parties for the defendant Big Sky which probably necessitated the issuance of the Alias Summons.

Title 12 O.S.Supp.1973 §155(c) provides:

> "(c) The summons shall state the answer date which shall be not less than thirty (30) days from the date summons was issued...."

This amendment to §155 became effective October 1, 1972.

The cases of Pittman v. Compton, 277 F.Supp. 772 (USDC ND Okl. 1968) and Vemco Plating, Inc. v. Denver Fire Clay Company, 496 P2d 117 (Okl. 1972) are inapplicable because they do not deal with §155(c) as amended.

In Morgan v. Atwell, 569 P2d 529 (Ct.App.Okl.1977) both summons contained an answer date of thirty days after date of issuance. Service there, as in this case, was made under the Uniform Interstate and International Procedure Act [12 O.S.1971 §1701.01 et seq.]. The Court held when service is made by virtue of 12 O.S.1971 §1701.03(a)(3), the answer date contained in that service of process must comply with the requirements for mail service set forth in 12 O.S.Supp. 1973 §155(c) allowing an answer date of 30 days from the date of issuance. The Court said, commencing at page 532:

> "....[T]he out of state motorist is susceptible to the jurisdiction of the courts of Oklahoma by virtue of 12 O.S.1971, §1701.03(a)(3).... When service is made thereunder, it is sufficient if the answer date contained in that service of process complies with the requirements for mail service set forth in 12 O.S. Supp. 1973 §155(c) and allowing an answer date of 30 days from the date of issuance."

The record in this case is clear plaintiff did not comply with 12 O.S.Supp.1973 §155(c)[1/]. Failure to follow the procedures

---

1/ The summons issued July 20, 1979 was served July 25, 1979; the summons issued December 20, 1979 was served December 28, 1979. Both summons directed an answer to be filed within 20 days after service, so from the date of issuance the answer date was 25 and 28 days respectively.

prescribed by statute will make the process on which suit is predicated fatally defective. Pittman v. Compton, supra; State ex rel Collins v. Parks, 126 P. 242 (Okl.1912); Aggers v. Bridges, 122 P. 170 (Okl. 1912); Tri-County State Bank v. Hertz, 418 F.Supp. 332, 344 (USDC MD Pa. 1976). Cf. Bookout v. Beck, 354 F2d 823, 824 (9th Cir. 1965) [dictum]. See also California Clippers, Inc. v. United States Soccer Football Association, 314 F.Supp. 1057, 1061-1062 (USDC ND Cal.1970).

It is therefore apparent service must be quashed and the case dismissed. Rule 12(b)(5), F.R.Civ.P.

Defendant has raised the additional question of the commencement date of the suit and running of the applicable two-year Oklahoma statute of limitations [12 O.S.1971 §95(3)]. It is the contention of defendant, apart from any defect in the answer date in the summons, the action was not commenced within the time provided in 12 O.S. 1971 §97, nor 12 O.S.1971 §154.5, relying on Tyler v. Taylor, 578 P2d 1214 (Ct.App. Okl. 1977); Lake v. Lietch, 550 P2d 935 (Okl.1976); Walker v. Armco Steel Corporation, 452 F.Supp. 243 (USDC WD Okl. 1978).

The Court, having determined the attempted service of process is fatally defective because of the erroneous answer date need not address the additional issue.

For the reasons above stated, IT IS ORDERED the summons issued herein directed to Big Sky Farmers and Ranchers Marketing Cooperative of Montana, a Montana corporation, be quashed and the Motion to Dismiss is sustained.

IT IS FURTHER ORDERED Ray M. Vernon be dismissed by virtue of the failure of plaintiff to prosecute, plaintiff having admitted in open Court no further attempt had been made to obtain service on him.

ENTERED this 8 day of May, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 7 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

HENRY L. SMITH, Plaintiff,	)	
vs.	)	No. 79-C-531-E
GENERAL MOTORS ACCEPTANCE CORPORATION, Defendant.	)	

JUDGMENT

Upon consideration of the pleadings, the briefs of the parties and the evidence presented at trial, as is more fully set out in the Findings of Fact and Conclusions of Law filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be and hereby is granted in favor of Defendant and against Plaintiff, Henry L. Smith, on Plaintiff's claims in this action.

IT IS SO ORDERED this 7th day of May, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Defendant.

No. 76-C-253-E

JUDGMENT

Upon consideration of the pleadings, the briefs of the parties, and all of the evidence presented at the trial, as is more fully set out in the Findings of Fact and Conclusions of Law filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and hereby is granted in favor of Defendant and against Plaintiff, EEOC, on Plaintiff's claims in this action together with costs, attorneys' fees and expenses.

IT IS FURTHER ORDERED that a Bill of Costs be filed within ten (10) days of the date of entry of this Judgment.

IT IS FURTHER ORDERED that a hearing on attorneys' fees and expenses is set for the 4th day of June, 1980, at 1:30 o'clock P m.

IT IS SO ORDERED this 7th day of May, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

PIPELINE INDUSTRY BENEFIT FUND,)
)
Plaintiff,)
)
vs.) No. 78-C-448-C
MARY FOSTER WHITEMAN and)
SANDRA WELCH,)
)
Defendant.)

FILED

MAY 7 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 6th day of May, 1980, regularly coming on for trial the above styled, and the plaintiff present in Open Court by and through its counsel Dyer, Power, Marsh and Turner, and the defendant, Mary Foster Whiteman, present in Open Court and by and through her counsel, William F. Powers, and the defendant, Sandra Welch, appearing not, but present by her counsel, Tom R. Gann, the parties hereto having waived any right to trial by jury, and the Court having received the defendant, Sandra Welch's, Dismissal with Prejudice and Consent to Judgment, and the Court being fully familiar with the files and records herein and having heard the sworn testimony of witnesses examined in Open Court, this Court having on the 14th day of February, 1980 entered its Order of Interpleaer, and the plaintiff having deposited with the Clerk of this Court the sum of $20,000.00 in the total and complete sum which the plaintiff might be found indebted, the Court finds that the defendant, Mary Foster Whiteman, is the only designated beneficiary to the death benefits owed by the plaintiff and heretofore deposited with this Court,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant, Mary Foster Whiteman, have judgment against the plaintiff in the sum of Twenty Thousand and No/100 Dollars ($20,000.00); that said judgment be satisfied forthwith by the Clerk of this Court, and the Clerk of this Court is hereby directed and authorized to pay unto the defendant, Mary Foster Whiteman, said $20,000.00 after deducting the costs of this action in the following particulars, to-wit: Court costs in the amount of $32.84; attorneys' fee for plaintiff's

counsel as provided within Title 29 USCA, Sec. 1138, et seq: $1,000.00.

IT IS FURTHER DECREED by the Court that the Clerk of this Court issue its check payable to Dyer, Powers, Marsh and Turner in the amount of $1,000.00, as a reasonable attorney's fee for the representation of the plaintiff, and further that the Clerk of this Court issue its check to Dyer, Powers, Marsh and Turner in the sum of $32.84 for reimbursement of court costs.

(Signed) H. Dale Cook

Judge of the District Court

APPROVED AS TO FORM:

/s/
William F. Powers, Attorney for
Mary Foster Whiteman

/s/
Tom R. Gann, Attorney for Sandra
Welch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MEDTRONIC, INC., a corporation, Plaintiff,	)	
vs.	)	No. 80-C-210-C
CLYDE J. DUNAVENT, JR., a/k/a SKIP DUNAVENT, an individual, Defendant.	)	

ORDER AND JUDGMENT

Pursuant to the Stipulation For Order of the parties on file herein,

IT IS HEREBY ORDERED:

1. (a) Defendant shall not, for a period of 180 days from the date of this Order, on behalf of himself or any other person or entity, solicit:

(1) Any of the following institutions or any employee or agent of said institutions:

Hillcrest Medical
Tulsa, Oklahoma

St. John's Hospital
Tulsa, Oklahoma

St. Francis Hospital
Tulsa, Oklahoma

Doctors Hospital
Tulsa, Oklahoma

Muskogee General Hospital
Muskogee, Oklahoma

(2) Any of the following physicians:

Joe Burge, M.D.
Jose R. Medina, M.D.
Lotfy L. Basta, M.D.
Joseph M. St. Ville, M.D.
Donald R. Bergman, M.D.
Edward W. Jenkins, M.D.
Maurice C. Fuquay, M.D.
Albert L. Shirkey, M.D.
Spencer H. Brown, M.D.
Clarence I. Britt, M.D.
Ben Gaston, M.D.
R. M. Shepherd, Jr., M.D.
R. W. Goen, Jr., M.D.

For the purpose of this Order, "solicit" shall include any oral or written communication with the persons or entities listed above for the purpose of encouraging any such person or institution to purchase or prescribe cardiac pacemakers, pacemaker leads or associated products or for the purpose of assisting or advising such persons or institutions in connection with the purchase or implantation of such devices.

(b) It shall not be a violation of this Order for Defendant to provide reasonably necessary advice and assistance to a listed person or entity in the case of a "medical emergency" provided that within two weeks after such an emergency, the Defendant notifies the Medtronic District Manager, Fort Worth District in writing of the occurrence, stating the date of the emergency, the attending physician and hospital involved and a brief description of the reason why the Defendant's assistance or advice was required. In the absence of such notice the provision of such advice and assistance shall be rebuttably presumed to violate Paragraph 1 of this Order. "Medical Emergency", for this purpose means a situation where advice or assistance of a representative is required in the opinion of the attending physician, for the welfare of a patient within a time so brief that no other representative of the manufacturer whose cardiac pacemaker products he represents can provide the needed service. The actions permitted by this paragraph shall be strictly limited to those expressly defined herein and shall not be read to permit any other activities prohibited by Paragraph 1(a).

2. Notwithstanding the provisions of Paragraph 1, it shall not be a violation of this Order for the Defendant to accept unsolicited orders from listed persons or institutions, provided that such orders are not initiated or encouraged, directly or indirectly, by the Defendant. In the event that Defendant receives such unsolicited orders he shall refer them to another sales representative or to his own agent.

3. Nothing in this Order shall preclude Defendant from receiving commissions or any monies on sales made which do not violate this Agreement.

4. This Order shall constitute the final judgment in this action and both parties are hereby released, each to bear his or its own costs, including attorney fees.

DATED: May 7th, 1980.

(Signed) H. Dale Cook

H. Dale Cook
Chief United States District Judge
for the Northern District of
Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BETTY HOWELL, Plaintiff,	)	
v.	)	No. 79-C-163-C
PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare, Defendant.	)	

FILED
MAY [illegible]
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The Court has before it for consideration the Findings and Recommendations of the Magistrate filed on April 25, 1980, in which it is recommended that judgment be entered for the defendant. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of all the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is hereby Ordered that judgment be and hereby is entered for the defendant.

It is so Ordered this 6th May, 1980.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHY LOU RUFFNER, Administratrix of the Estate of Mildred Marie Baugh, deceased,

Plaintiff,

vs.

JACQULINE M. DENGLER, PAUL H. CLAYTON and ERNEST H. CLAYTON,

Defendants.

No. 80-C-100-E

O R D E R

The Court has before it for consideration Defendants' Motion to Dismiss for lack of jurisdiction over the person and Plaintiff's motion for change of venue to the United States District Court for the State of Colorado. Defendants filed a brief in support of the motion. The Plaintiff filed a response brief and urged the action not be dismissed in the event the Court finds no personal jurisdiction, but rather should be transferred. The Plaintiff filed a brief in support of its motion to change venue. The Defendants filed an affidavit of the attorney, Mr. Murphy which stipulates to a change of venue.

The complaint involves an automobile accident which occurred in Colorado. Two of the Defendants reside in Colorado. The Defendants argue that Defendant Dengler is not subject to service of process within the Northern District of Oklahoma.

The Plaintiff alleges that the jurisdictional requirement is satisfied because the State of Oklahoma is the situs of the administration of the Estate and the state of residence of the survivors of the deceased, Mildred Baugh.

Rather than dismiss this action for lack of in personam jurisdiction, this Court shall transfer the action to the United States District Court for the State of Colorado pursuant to 28 U.S.C.A. §1404.

Accordingly, the Court finds that this action should be and hereby is transferred to the United States District Court for the State of Colorado. The Clerk of this Court is directed to take all appropriate measures in order to effectuate this transfer.

It is so Ordered this 5th day of May, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
PHILLIP L. MORGAN, Defendant.	)	CIVIL ACTION NO. 79-C-497-C

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 6th day of May, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN D. TIMMONS,

Plaintiff,

vs.

MATILDA RUMMAGE,

Defendant.

79-C-50-BT

JUDGMENT

Based on the Findings of Fact and Conclusions of Law filed this date, IT IS ORDERED Judgment be entered in favor of the defendant Matilda Rummage, and against the Plaintiff, John D. Timmons.

ENTERED this 5 day of May, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN D. TIMMONS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-50-BT
	)	
MATILDA RUMMAGE,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on for nonjury trial this 2nd day of May, 1980. The parties appeared in person and through their counsel of record announcing ready to proceed. After hearing and considering all of the evidence, both sides having rested, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff, John D. Timmons, is an individual, citizen and resident of Tulsa, Tulsa County, State of Oklahoma.

2. The defendant, Matilda Rummage, is an individual, citizen and resident of the State of California, and is the trustee of the Harry L.S. Halley Revocable Trust. As trustee she is sued in this action.

3. The defendant as trustee of the Harry L. S. Halley Revocable Trust is the owner of the real property hereafter described:

> SE NE NE & W/2 NE NE & W/2 NE NE NE and East 25 acres of L-6 & E/2 NW NE, Section 9,T19N, R16E, containing 80 acres more or less and the NW NW NW, Section 10, T19N, R16E, containing 10 acres more or less, and NE NE NE NE,Section 9, T19N, R16E, containing 2.5 acres more or less, all situated within Rogers County, State of Oklahoma.

The property in question, having a value in excess of $10,000.00 is located within Rogers County, Oklahoma and within the jurisdiction of the United States District Court for the Northern District of Oklahoma.

4. In May 1977, the plaintiff, through his real estate agent, Elmo Morrison, made an offer to purchase the subject real property from the defendant. Negotiations between the parties continued until December 1977.

5. The plaintiff signed a Contract of Sale of Real Estate (PX-3) relative to the subject real property on December 5, 1977, and sent it for acceptance to the defendant at her California residence. The defendant made three changes in the subject Contract of Sale of Real Estate; the first changing the legal description to add 2.5 acres, the second changing the utility easement language to easements generally, and thirdly, adding Paragraph 5 to the Special Conditions in which she retained three-fourths of the minerals, which was contrary to Paragraph 4 of the Special Conditions conveying the minerals to the plaintiff as the prospective purchaser.

6. The defendant signed Plaintiff's Exhibit 3, the Contract of Sale of Real Estate on December 13, 1977, but before mailing it to her lawyer, Frank Turner of Tulsa, Oklahoma, she telephoned him and advised him she did not desire to consummate this real estate sale for cash because of the capital gains tax implication, but wanted to pursue considering a tax free real property exchange.

7. The defendant advised her attorney she would return the signed real estate contract to him and specifically directed him not to deliver the signed Contract of Sale of Real Estate to anyone but merely hold it in his file, while the tax free property exchange was being considered.

8. In the latter part of December 1977 Turner received the signed Contract of Sale of Real Estate from the defendant and in keeping with her instructions contacted the plaintiff's agent, Elmo Morrison, and explained the defendant would not consummate this real estate contract. At that time attorney Turner marked out the defendant's name with a pen from one of the three identical Contracts of Sale of Real Estate returned to him by the defendant and gave it to Morrison requesting he use it and consider working toward an agreement involving a

tax free real property exchange between the plaintiff and the defendant.

9. In the latter part of December 1977 the plaintiff paid to the realtor, Elmo Morrison, the sum of $14,000.00 earnest money pursuant to the Contract of Sale of Real Estate (PX-3).

10. Thereafter, the parties continued negotiations in reference to a tax free real property exchange to no avail and then commenced further negotiations concerning a cash sale when the negotiations ultimately broke down in the latter half of 1978.

11. There was never a meeting of the minds of the parties that culminated in a written agreement concerning the sale of the subject real property.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the parties and the subject matter of this suit. 28 U.S.C. §1332.

2. The Statute of Frauds, 15 O.S.1951 §136 provides as follows:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:
>
> "5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein;...."

3. Before there can be an enforceable agreement for the sale of real property there must be a meeting of the minds of the parties on the essential elements of the agreement which should be reduced to writing. Griffin Grocery Co. v. Kingfisher Mill & Elevator Co., 32 P.2d 63, 66 (Okl. 1934); Cloud v. Winn, 303 P.2d 305, 309 (Okl. 1956); Altshuer v. Malloy, 388 P.2d 1, 4 (Okl. 1964); Maddox v. Northern Natural Gas Co., 259 F.Supp. 781, 783 (USDC WD Okl. 1966).

4. The Court finds the minds of the parties did not meet upon all of the essential elements of the contract sought to be enforced. The acceptance must be absolute, unconditional, and identical with the terms of the offer, and must in every material respect meet and correspond with the offer. Any qualification

of or departure from those terms invalidates and rejects the offer. Maddox v. Northern Natural Gas Co., supra; Hartzell v. Choctaw Lumber Co. of Delaware, 22 P2d 387 (Okl.); Nabob Oil Co. v. Bay State Oil and Gas Co., 255 P2d 513 (Okl. 1953).

5. The Court finds the parties did not reach a valid agreement regarding the sale of the real property involved, there being no meeting of the minds which was reduced to writing and signed by the parties.

The Court, therefore, finds, based on the Findings of Fact and Conclusions of Law, Judgment should be entered in favor of the defendant and against the plaintiff.

ENTERED this 5 day of May, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUANITA KEETON,

Plaintiff,

vs.

SUN OIL CO., a Pennsylvania corporation, doing business in the State of Oklahoma, and SUN PETROLEUM PRODUCTS COMPANY, INC., A Wholly-Owned Subsidiary, a Division of SUN OIL COMPANY,

Defendants.

No. 79-C-145-BT

JUDGMENT

Based on the Findings of Fact and Conclusions of Law filed this date, IT IS ORDERED Judgment be entered in favor of the defendants Sun Oil Co., a Pennsylvania corporation, doing business in the State of Oklahoma, and Sun Petroleum Products Company, Inc., a Wholly-Owned Subsidiary, a Division of Sun Oil Company, and against the plaintiff, Juanita Keeton.

ENTERED this 5 day of May, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUANITA KEETON, Plaintiff, vs. SUN OIL CO., a Pennsylvania corporation, doing business in the State of Oklahoma, and SUN PETROLEUM PRODUCTS COMPANY, INC., A Wholly-Owned Subsidiary, a Division of SUN OIL COMPANY, Defendants.	)	No. 79-C-145-BT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This case came on for trial to the Court on April 30, 1980, at which time the parties appeared with their counsel of record, announcing ready to proceed. The Court heard evidence and after both sides rested the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is a Caucasian female who is currently employed by Sun Petroleum Products Company, a Division of Sun Oil Company of Pennsylvania (hereinafter Defendant). She has been employed by the defendant and its predecessor companies for over 25 years.* (Since 1952). It is not disputed plaintiff is an excellent worker.

2. Hicks Clark, a Caucasion male, was an employee of defendant and its predecessors, Mid-Continent Petroleum Company and Sunray D-X Oil Company, from 1930 until his retirement on July 1, 1973.*

3. Clark became an employee of defendant in 1968 when Sunray D-X Oil Company merged with the defendant.

4. At the time of the merger, Clark was in an exempt classification with the title of Unbranded Lube Sales Representative.

5. Prior to 1970 as an Unbranded Lube Sales Representative of the defendant, Clark performed a number of duties comprising a

*Asterisk indicates Findings of Fact stipulated by the parties and set forth in the Pre-Trial Order.

significant part of his job responsibilities which included, among others:

a. Preparation of bids in connection with petroleum products to the United States Government defense establishments;

b. Dealing with product export sales and compiling the necessary documents, permits, licenses, etc., required to comply with United States and foreign governmental regulations; and

c. The computation of prices and negotiation of spot contracts necessary to consummate the sale of lubricating oils to domestic customers.

6. Beginning the latter part of 1969 Clark's duties gradually declined because the job functions mentioned in the above paragraph were transferred from Tulsa to the Company's main offices in Philadelphia, Pennsylvania. By the end of 1972, Clark was performing none of the functions listed in paragraph 5 above.

7. Clark retired as an employee of the defendant on July 1, 1973. At the time of his retirement, Clark was classified as an exempt grade 24. His salary history with the defendant is as follows:*

AS OF	MONTHLY SALARY
11/1/67	$ 800.00
3/1/69	880.00
4/1/70	930.00
4/1/71	1,010.00
4/1/72	1,100.00

8. Although Clark's duties significantly declined, and the nature of his job changed, he was continued at the same general salary level because of his 40 years seniority and forthcoming retirement.

9. Shortly prior to Clark's retirement, the duties he was performing at the time of his retirement, together with certain clerical and secretarial duties, were combined into one job entitled "Office Assistant", and a job description prepared for same.*

10. This job description for Office Assistant was then submitted for evaluation by Defendant's Tulsa Non-Exempt Job Evaluation Committee to determine the proper pay grade for the job.*

11. The Non-Exempt Job Evaluation Committee evaluated the job as a non-exempt Grade 48.*

12. The job evaluation was made without consideration of sex.

13. Pursuant to routine procedures for non-exempt job openings, the job was posted for bids.*

14. At the time this job came open, plaintiff was employed at defendant's refinery in Tulsa, Oklahoma.*

15. W. R. Adkisson, a Wholesale Area Sales Manager for defendant, had previously known plaintiff and because of her capability encouraged her to apply for the job.*

16. Plaintiff did apply, was awarded the job, and was transferred to the position of Office Assistant on June 10, 1973, at a pay rate of $193.00 per week.*

17. The Department of Energy regulations and governmental controls increased the paper work in plaintiff's job as well as generally in the industry after 1974.

18. The following sets forth Plaintiff's wage history in the job through November 6, 1977:*

DATE	JOB CLASSIFICATION	GRADE	TYPE OF INCREASE	AMOUNT OF INCREASE	WEEKLY WAGE
6/10/73	Office Assistant	48			$193.00
4/14/74	" "	"	Merit	$17.00	210.00
6/23/74	" "	"	General	6.30	216.30
11/10/74	" "	"	Merit	16.70	233.00
12/1/74	" "	"	General	16.31	249.31
11/9/75	" "	"	Merit	21.19	270.50
11/7/76	" "	"	"	20.00	290.50
11/6/77	" "	"	"	20.00	310.00

19. On November 17, 1977, plaintiff called W.J. Magers, the President of the Sun Petroleum Products Division (SPPC) of defendant concerning the status and pay level of her job.*

20. Mr. Magers thereafter requested Ross V. Weaver, Jr., Manager of Human Resources of SPPC, to investigate the matter.*

21. Weaver did investigate and, as a result, it was concluded that a new job description for Plaintiff's job should be prepared, and the job thereafter evaluated by the SPPC Hay Job Evaluation Committee, which was the exempt-job evaluation committee for all exempt jobs in the SPPC Division of Defendant.*

22. On or about April 14, 1978, following a number of drafts and revisions, a job description signed by plaintiff and which correctly described her job was forwarded to the SPPC Hay Job Evaluation Committee.*

23. On April 20, 1978, the SPPC Hay Job Evaluation Committee met and evaluated plaintiff's job as being exempt with 219 Hay points.*

24. Sex was not a factor in the 219 Hay point evaluation.

25. The Hay point system is a factor point job evaluation system accepted and employed world-wide by many of the larger corporations of the United States. The job is evaluated for the purposes of determining an appropriate salary range, apart from any consideration of the person to fill the job.

26. On April 24, 1978, W. R. Naylor, defendant's then Manager of Wholesale Sales located in Philadelphia, Pennsylvania, informed plaintiff that her job had been evaluated as being exempt with 219 Hay points. He told her that she had the choice of remaining in her Grade 48 Office Assistant classification, or being reclassified to Executive Assistant at 219 Hay points. To help make her decision, he indicated to her that the then-current weekly wages for the two jobs were as follows:*

	Minimum	Mid-Point	Maximum
Grade 48	$232	$291	$350
219 Hay Points	$228	$285	$342

27. Plaintiff opted to be reclassified to Executive Assistant with 219 Hay points, and was so classified effective May 7, 1978. Her wage history in the job is as follows:

DATE	JOB CLASSIFICATION	TYPE OF INCREASE	AMOUNT OF INCREASE	WEEKLY WAGE
5/7/78	Executive Assistant - 219 Hay Points			$310.00
11/6/78	" " "	Merit	$23.00	333.00
11/4/79	" " "	"	25.00	358.00
11/4/79	" "" "	C.O.L.	18.00	376.00

28. On August 4, 1978 plaintiff filed a charge of sex discrimination with the Equal Employment Opportunity Commission.* The Equa Employment Opportunity Commission issued its right to sue letter of December 6, 1978 and the complaint herein was timely filed.

29. The Court finds no sex discrimination in either plaintiff' pay or treatment as an employee.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the subject matter and the parties. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e et seq., and the Equal Pay Act, 29 U.S.C. §206.

2. Because of the continuing nature of the alleged sex discrimination herein, it can be concluded the plaintiff filed her complaint within the 180 days provided by law.

3. The nature of the prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), was examined by the Supreme Court in Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), and reaffirmed in Board of Trustees of Keene St. Col v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, _____L.Ed.2d _____ (1978). See also Hernandez v. Alexander, 607 F.2d 920 (10th Cir. 1979); Central Piedmont Community Col., 475 F.Supp. 114, 119 (USDC WD N.Cr.1979); Booth v. Board of Directors of Nat. Am. Bank, 475 F.Supp. 638, 649 (USDC ED La. 1979).

4. In McDonnell Douglas, supra, the Supreme Court held that a plaintiff could make out a prima facie claim by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S., at 802. [footnote omitted].

In Furnco Const. Corp. v. Waters, supra, the Court said of the prima facie claim:

> "This, of course, was not intended to be an inflexible rule, as the Court went on to note that '[t]he facts necessarily will vary in Title VII cases, and the specifications....of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situation."

5. Plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters v. United States, supra; Furnco Const. Corp. v. Waters, supra.

6. The central focus of inquiry is whether the employer is treating "some people less favorably than others because of their.... sex...." International Brotherhood of Teamsters v. United States, supra; Furnco Const. Co. v. Waters, supra.

7. The Court concludes, as a matter of law, under all of the evidence and the foregoing Findings of Fact, plaintiff sustained her burden under the applicable Supreme Court criteria.

8. The burden then shifted to the defendants (employer) to prove that they based their employment decision on legitimate considerations, and not an illegitimate one such as sex. Under McDonnell Douglas, supra; Furnco Const. Corp. v. Waters, supra; and Board of Trustees of Keene St. Col. v. Sweeney, supra, the employer need only "articulate some legitimate nondiscriminatory reason for" its acts.

9. The proof of a justification which is reasonably related to the achievement of some legitimate goal does not necessarily

end the inquiry. Plaintiff was given an opportunity to introduce evidence that the proffered justification was merely a pretext for discrimination. McDonnell Douglas, supra; Furnco Const. Corp. v. Waters, supra.

10. The Court concludes, under the applicable law, the use of the Hay point program by defendants is a legitimate non-discriminatory use and did not constitute a pretext for discrimination. The defendants have dispelled the presumption arising from plaintiff's proof.

11. Title 42 §2000e-2(h) provides, in pertinent part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, of different terms, conditions, or privileges of employment pursuant to a bona fide seniority....system....provided that such differences are not the result of an intention to discriminate because of ....sex...."

There was no evidence introduced to indicate employees of defendants are treated differently based on their sex in the seniority system of defendants. United Air Lines, Inc. v. Evans, 431 U. S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1971).

12. The Court concludes, as a matter of law, there was no violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2003 et seq.

13. In order to establish a prima facie case under the Equal Pay Act (29 U.S.C. §206), plaintiff has the burden of proof to show the defendants paid a different wage to her for equal work on the job, the performance of which requires equal skill, effort, and responsibility, and which is performed under similar working conditions. Cornin Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); Marshall v. J. C. Penney Co., Inc., 464 F.Supp. 1166, 1193 (USDC ND Ohio ED 1979); Gunther v. County of Washington, 602 F2d 882, 887 (9th Cir. 1979). Plaintiff is not required, however, to show that the jobs performed are identical. Peltier v. City of Fargo, 533 F2d 374, 377 (8th Cir. 1976); Usery v. Allegheny County Institutions District, 544 F2d 148, 153 (3rd Cir. 1976); Gunther v. County of Washington, supra. Plaintiff may prove a violation of the Equal Pay

Act by showing that the skill, efforts, and responsibility required in the performance of the job is "substantially equal." Usery v. Columbia University, 568 F2d 953, 958 (2nd Cir. 1977); Ridgeway v. United Hospitals--Miller Division, 563 F2d 923, 926 (8th Cir. 1977); Gunther v. County of Washington, supra.

14. Actual job performance and content--not job titles, classifications or descriptions--is determinative. Gunther v. County of Washington, supra. See Katz v. School District of Clayton Missouri, 557 F2d 153, 156 (8th Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F2d 1164, 1171 (3rd Cir. 1977).

15. Once plaintiff met her burden, the burden shifted to defendants to prove that the unequal pay was due to one of the Equal Pay Act's four exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. §206(d)(1); Pearce v. Wichita City, City of Wichita Falls, Etc., 590 F2d 128 (5th Cir. 1979).

16. The facts, as presented in this case reveal the defendants use of the Hay point system represented a good faith attempt to comply with the Equal Pay Act. Job descriptions, when presented to the committee for consideration, contain no name of an individual [even if an incumbent], and no designation of sex. The mere fact that some clerical duties may be included in the job description does not give rise to an inference the position is to be filled by a female. No evidence is in the record the Hay points attributed to plaintiff's position would have been different if the position had been filled by a male.

17. The Court concludes there has been no violation of the Equal Pay Act, 29 U.S.C. §206.

The Court, therefore finds, based on the foregoing Findings of Fact and Conclusions of Law, Judgment should be entered in favor of defendants and against plaintiff.

ENTERED this 5 day of May, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 79-C-104-E
	)	
vs.	)	Part B of Tract 312, and Tract 312E-6
	)	
3.40 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Mary Ethel Thomas, et al., and Unknown Owners,	)	As to all interests in the estate taken.
	)	
	)	(Included in D.T. filed in Master File #400-14
Defendants.	)	

FILED

MAY 2 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

1.

Now, on this 2nd day of May, 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tracts Nos. Part B of Tract 312, and Tract 312E-6, as such estate and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this case.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on February 13, 1979, the

United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in subject tracts a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject tracts and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tracts is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tracts and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tracts Nos. Part B of Tract 312 and

Tract 312E-6, as such tracts are particularly described in the Complaint filed herein; and such tracts, to the extent of the estate described in such Complaint, are condemned, and title thereto is vested in the United States of America, as of February 13, 1979, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tracts were the defendants whose names appear below in paragraph 12, and the interest owned by each person is shown by the fraction following such person's name, and the right to receive the just compensation for the estate taken herein in such tracts is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estate condemned in subject tracts as follows:

TRACTS NOS. PART B OF TRACT 312, and TRACT 312E-6

OWNERS:

Mary Ethel Thomas	1/2	
Lloyd Thomas	1/10	
Norma Lee Defenbaugh	1/10	
Carol Warden	1/10	
Kathleen Pruett	1/10	
Lois Ann Anderson	1/10	
Award of just compensation pursuant to stipulation	$150.00	$150.00
Deposited as estimated compensation	54.00	
Disbursed to owners		None
Balance due to owners		$150.00
Deposit deficiency	$ 96.00	

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tracts, the deposit deficiency in the sum of $96.00, and the Clerk of this Court then shall disburse the deposit for such tracts as follows:

To:

Mary Ethel Thomas ---------- $75.00

Lloyd Thomas ---------- $15.00

Norma Lee Defenbaugh ---------- $15.00

Carol Warden ---------- $15.00

Kathleen Pruett ---------- $15.00

Lois Ann Anderson ---------- $15.00

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNIE FRED CARTER,

Plaintiff,

vs.

OKLAHOMA STATE BUREAU OF INVESTIGATION,

Defendant.

No. 80-C-109-E

ORDER

The Court has before it for consideration Defendant's motion to dismiss the action on the ground that the complaint fails to state a claim against Defendant OSBI upon which relief can be granted. Defendant is an agency of the State of Oklahoma and states that it is not a federal "agency" within the purview of 5 U.S.C. §552 et. seq.

The Freedom of Information Act empowers federal courts to order an "agency" to produce records improperly withheld from an individual requesting access. See §552(a)(4)(B). The U. S. Supreme Court in Forsham, et. al. v. Harris, Secretary of Health, Education and Welfare, et. al., (No. 78-1118, decided March 3, 1980), held that the FOIA does not apply to a non-federal entity even if it were to receive federal money. See also Kerr v. United States, 511 F.2d 192 (Ninth Cir. 1975).

Plaintiff made a motion to the Court on April 3, 1980, requesting the Court to stay consideration of Defendant's motion to dismiss until Plaintiff had responded. Plaintiff was directed to respond to this motion on April 16, 1980. On April 10, 1980, the Plaintiff filed with this Court a motion to stay.

The Court has carefully considered the motions filed and the responses and has determined that based upon the reading of the FOIA and cases cited that Defendant's motion to dismiss should be granted.

It is therefore the order of this Court that the Defendant's motion to dismiss is hereby granted.

It is so Ordered this 2nd day of May, 1980.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 79-C-102-E
	)	
vs.	)	Part A of Tract 312, and Tracts 312E-1, 312E-2, 312E-3, 312E-4 and 312E-5
	)	
128.38 Acres of Land, More or Less, Situate in Washington	)	
County, State of Oklahoma, and	)	As to all interests in the
Mary Ethel Thomas, et al., and	)	estate taken except the oil
Unknown Owners,	)	and gas leasehold interest.
	)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #400-R4)

FILED

MAY 2 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

1.

Now, on this 2nd day of May, 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tracts Nos. Part A of Tract 312, and Tracts 312E-1, 312E-2, 312E-3 312E-4 and 312E-5, as such estate and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this case.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right,

power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on February 13, 1979, the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in subject tracts a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject tracts and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tracts is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tracts and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tracts listed in paragraph 2 herein, as such tracts are particularly described in the Complaint filed herein; and such tracts, to the extent of the estate described in such Complaint, are condemned, and title thereto is vested in the United States of America, as of February 13, 1979, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tracts were the defendants whose names appear below in paragraph 12, and the amount of each owner's interest is shown by the fraction following each owner's name; and the right to receive the just compensation for the estate taken herein in such tracts is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estate condemned in subject tracts as follows:

TRACTS NOS. PART A OF TRACT 312,
312E-1 thru 312E-5, Inclusive

OWNERS:

Mary Ethel Thomas ---------- 1/2
Lloyd Thomas ---------- 1/10
Norma Lee Defenbaugh ---------- 1/10
Carol Warden ---------- 1/10
Kathleen Pruett ---------- 1/10
Lois Ann Anderson ---------- 1/10

Award of Just Compensation pursuant to Stipulation ---------	$6,065.00	$6,065.00
Deposited as estimated compensation ----------	2,739.00	
Disbursed to owners ----------		None

Balance due to owners ---------- $6,065.00

Deposit deficiency ---------- $3,326.00

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tracts, the deposit deficiency in the sum of $3,326.00, and the Clerk of this Court then shall disburse the deposit for such tracts as follows:

To:

Mary Ethel Thomas ----------	$3,032.50
Lloyd Thomas ----------	606.50
Norma Lee Defenbaugh ----------	606.50
Carol Warden ----------	606.50
Kathleen Pruett ----------	606.50
Lois Ann Anderson ----------	606.50

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney